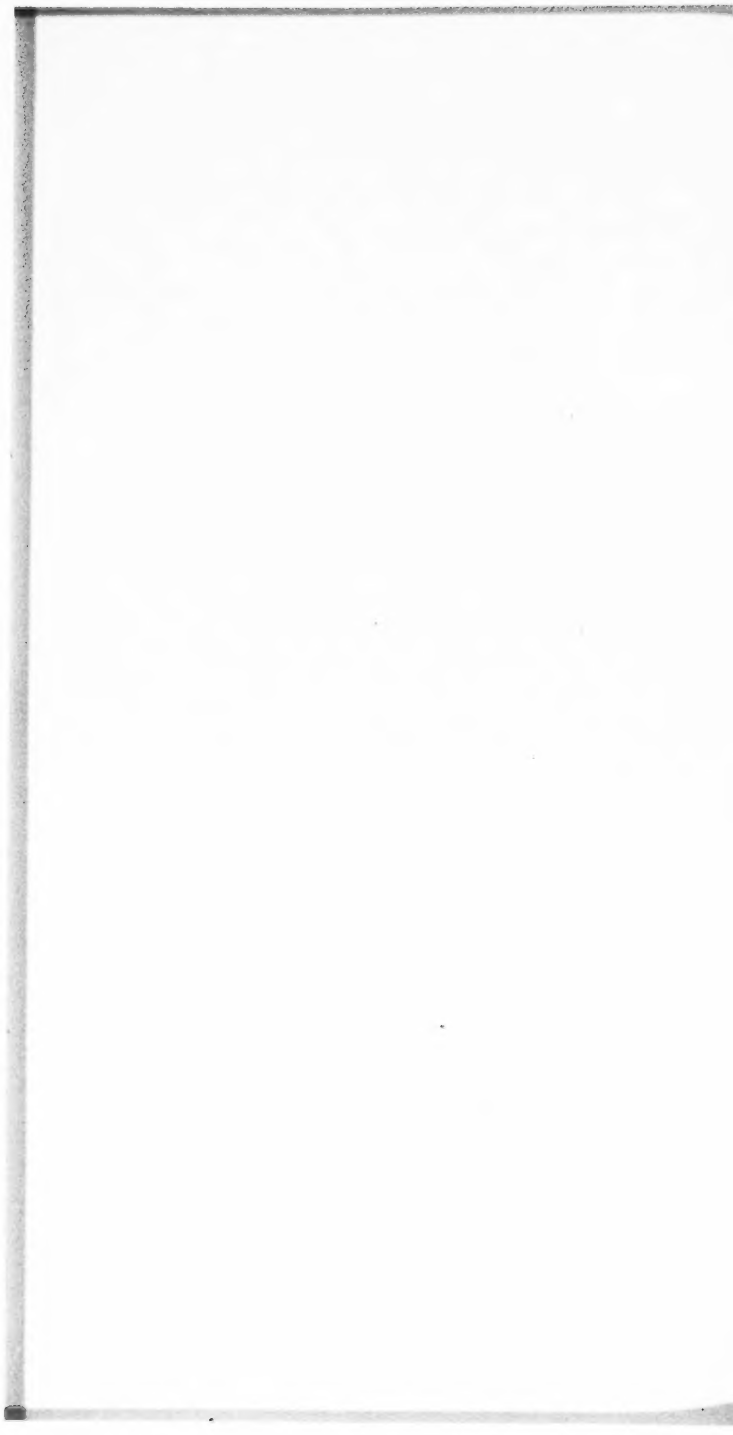
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16462

Supreme Court

OF THE

United States

OCTOBER TERM, 1903.

No. 175.

Pacific Electric Railway Company,
Appellant,

vs.

The City of Los Angeles, P. W. Powers, W. H. Pierce et al., etc.,
Appellees.

BRIEF ON BEHALF OF CERTAIN APPELLEES, NAMELY, THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PIERCE, GEORGE P. McLAIN, FRANK WALKER, WM. M. BOWEN, A. A. ALLEN, B. S. LOUDER, R. A. TODD, E. L. BLANCHARD, COMPOSING THE COUNCIL OF THE CITY OF LOS ANGELES, AND M. P. SNYDER, MAYOR OF THE CITY OF LOS ANGELES.

Statement of the Case.

This suit was brought in the Circuit Court of the Ninth Circuit, Southern District of California, Southern Division, by the appellant, a corporation organ-

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ized under the laws of the state of California, against the City of Los Angeles, a municipal corporation of that state, the Councilmen and Mayor of the City of Los Angeles, the Los Angeles Traction Company, a corporation organized and existing under the laws of the state of Illinois, Wm. S. Hook and E. A. Davis, to obtain a decree adjudging and declaring that the appellant is the owner of a franchise for the construction and operation of a street railroad upon and along certain streets in the City of Los Angeles; that none of the appellees has any right or title to said franchise; that certain orders and resolutions of the council of the City of Los Angeles purporting to reconsider the vote of said council by which said franchise was granted to the appellant, and all proceedings taken by said council to hinder or impede the appellant in the use and enjoyment of said franchise, are null and void; and that the defendants, and all of them, be restrained from preventing the appellant from constructing said street railroad and exercising the franchise which it claims to have acquired from the City of Los Angeles. [Tr. pp. 24 and 25, fols. 38 and 39.]

The allegations of the bill upon which appellant based its contention that the Circuit Court should interfere in its behalf for the purpose of administering the relief prayed for, are as follows:

That in 1901, the legislature of the state of California passed an act providing for the sale of street railroad and other franchises in municipalities, and prescribing conditions for the granting thereof by the "legislative or other governing bodies" of such

municipalities. [Statutes of California, 1901, p. 265, Tr. pp. 2-5, fols. 4-8.]

That, availing itself of the provisions of this act, the appellant presented to the council of the city of Los Angeles an application for an electric street railway franchise, and said council thereupon advertised the fact of the application, together with the statement that it was proposed to grant the same, and fixed the tenth day of February, 1902, at 11 o'clock a. m., as the time for receiving and opening sealed bids therefor, as required by the act of 1901.

That prior to the time so fixed, four sealed bids were delivered to the city council, to wit, a bid by appellant of $25,000; a bid by Wm. S. Hook of $37,500; a bid by E. A. Davis of $139,000; and a bid by E. Murray of $415,000.

That at the time provided by the notice of sale said bids were opened by the city council, and no higher bid than that of E. Murray being made, the council ordered that said franchise be struck off, sold, and granted to said E. Murray.

That said Murray failed to pay the amount so bid by him, or any part of it, within the time allowed by the act of 1901 for such payment, viz: within twenty-four hours after the franchise had been so awarded.

That the council met on February 11th, and when said period of twenty-four hours had expired, and Murray had not paid the $415,000 bid by him, or any part thereof, the council, by resolution, declared him to be a "fraudulent and irresponsible bidder" and "his said bid null and void."

That thereupon the appellant offered to raise the

bid of $139,000 made by the appellee, E. A. Davis, (which was the next highest bid to that of E. Murray) ten per cent. and to pay for the franchise the sum of $152,900.

That said E. A. Davis claimed that he had become entitled to the said franchise and tendered to said council the amount of his bid, to wit, the sum of $139,000 in gold coin.

That said tender was refused by the city council, and the bid of the appellant was accepted, and, by resolution, it was ordered that said franchise be struck off, sold and granted to the Pacific Electric Railway Company, the appellant, for the sum of $152,900.

That said sum was paid to the treasurer of the city of Los Angeles by said appellant, and was accepted by said treasurer, and by the city council, and that thereupon the appellant executed and delivered to the city council a bond with two sureties, as required by the notice of sale, and the act of 1901, conditioned for the faithful performance of the terms of said franchise, and said bond was by the city council approved and accepted and ordered to be filed in the office of the city clerk.

That thereafter the city council passed an ordinance granting said franchise to the appellant.

That this ordinance was presented to the mayor of the city for his approval, and that he, within ten days thereafter, returned said ordinance without such approval, and with his objections thereto, and on the 21st day of February, 1902, the said city council reconsidered the said ordinance, and upon a vote being taken upon the passage of said ordinance not-

withstanding the mayor's veto, the said council voted against the passage thereof, and thereupon passed a resolution ordering all bids for said franchise, including the bid of the appellant, to be rejected, and directing the city treasurer to refund to the appellant the amount of his bid, and the city clerk to return the bond executed by said appellant.

That said council directed that the original application for said franchise be referred to the board of public works, and instructed said board to re-draft the notice of sale of said franchise.

These proceedings, the bill alleges, were taken by the council upon the theory that an ordinance approved by the mayor was necessary to give validity to the grant of said franchise, while the appellant alleges that under the act of 1901, the council had no discretion in the disposing of said franchise, but were by said act required to grant the same to the appellant, and that no ordinance was necessary to perfect said grant and that the title of the appellant thereto was fully vested under the statutes without the approval of the mayor.

That on the 26th day of February, the council passed an order instructing the mayor, the street superintendent and the chief of police to stop and prevent any attempt that the appellant might make to construct any street railway.

That under the orders of the council, the treasurer of the city offered to return to the appellant, the $152,900 paid by it, and the city clerk offered to return the bond executed by it, but the appellant refused to accept either.

It is alleged in the bill that all of the proceedings of the council purporting to repeal, rescind, vacate, or annul the franchise claimed by the appellant to have been granted to it, or to prevent the exercise of any rights, or privileges, thereunder are in violation of the Constitution of the United States.

To this bill a demurrer was interposed on behalf of the city, and its mayor and councilmen, upon the grounds:

(1) That the Court had no jurisdiction of the subject-matter of the suit;

(2) That there was no equity in the bill;

(3) That the bill was defective in certainty, in that it could not be determined therefrom how many franchises were described in the notice of sale, or offered for sale, or granted pursuant to the notice of sale set forth in the bill.

The Honorable Judge of the Circuit Court, in his ruling upon the demurrer, held that the court had jurisdiction of the case, but that the complainant had never acquired the franchise claimed by it; and it was ordered and decreed that the bill be dismissed for want of equity. From this order and decree the appellant has appealed to this court.

THE COURT HAS NO JURISDICTION OF THIS SUIT.

As the requisite diversity of citizenship does not exist, the court has no jurisdiction of this suit unless it is one which arises under the constitution or laws of the United States.

"* * * the circuit courts of the United States "shall have original cognizance, concurrent with the "courts of the several states, of all suits of a civil na- "ture * * * arising under the constitution or "laws of the United States." [25 St. at L. 433 cap. 866.]

As stated by Chief Justice Marshall, a case "may be "said to arise under the constitution or a law of the "United States, whenever its correct decision depends "upon the construction of either."

Osborne v. Bank of the United States, 9 Wheat 822.

In the case of *Shreveport v. Cole*, 129 *U. S.* 36, the court said:

"Unless this suit was one 'arising under the consti- "'tution or laws of the United States,' the circuit court "had no jurisdiction; and if it did not really and sub- "stantially involve a dispute or controversy as to the "effect or construction of the constitution or some "law, upon the determination of which the recovery "depended, then it was not a suit so arising. Starin "v. New York, 115 U. S. 248, 246; Gold Washing "Co. v. Keyes, 96 U. S. 199."

See also *City of New Orleans v. Benjamin*, 153 *U. S.* 411.

We submit that the bill does not present an actual and substantial controversy as to the effect or construc-

tion of the constitution, or of any law, of the United States, on the determination of which the recovery depends, and, therefore, does not make a case within the jurisdiction of a federal court.

Counsel for appellant contend that grounds for such jurisdiction exist under the provisions of section 10 of article I of the constitution, declaring that no state shall pass any law impairing the obligation of contracts [brief, p. 141], and under the provision of the 14th Amendment prohibiting a state to deprive any person of life, liberty or property without due process of law. [Brief, p. 147.]

I.

The bill does not state a case within the protection of the impairment clause of the Constitution.

Section 10, of article I of the constitution of the United States, provides: "No state shall * * * "pass any * * * law impairing the obligation "of contracts." Concerning this clause of the constitution this court has held that in order to come within the meaning thereof "not only must the obligation of a "contract have been impaired, but it must have been "impaired by a law of the state. The prohibition is "aimed at the legislative power of the state, and not "at the decisions of its courts, or the acts of adminis- "trative or executive boards or officers, or the doings "of corporations or individuals."

New Orleans W. W. v. La. Sugar Co., 125 U. S. 18, 30.

It will be seen from this case that the impairment must be "by a *law* of the state," and that "the prohibi-" tion is aimed at the *legislative* power of the state."

The acts complained of in the bill, as impairing the obligation of the contract claimed by the appellant, are the actions of the council of the city of Los Angeles, reconsidering the ordinance purporting to grant a franchise to the appellant, after the same had been vetoed by the mayor; its vote against the passage of said ordinance over the mayor's veto; its adoption of resolutions rejecting all bids and directing the city treasurer and the city clerk, respectively, to refund and return to the appellant the amount of its bid, and the bond executed by it; also the order of the council directing the original application for said franchise to be referred to the board of public works for the re-draft of a notice of sale thereof; and the subsequent order of the council instructing the mayor, the street superintendent and the chief of police to prevent the construction by the appellant of any street railway.

We submit that none of these acts has the form or semblance of law, or purports to be law. The contract claimed by counsel to exist and to be impaired, is one which, if it existed at all, (which we do not concede) arose when the franchise was struck off to appellant, or, at least, when the money was paid and the bond filed, and a subsequent failure or refusal on the part of the city council to pass an ordinance over the mayor's veto could not be a law impairing the obligation of a contract whose existence did not depend upon the passage of an ordinance. No authority is cited, and

we think that none can be found, to sustain the proposition that the order rejecting all bids, the order referring the petition to the board of public works, or the order to the mayor, the street superintendent, and the chief of police was a law. The only method of enacting a law possible to the city of Los Angeles is by ordinance approved by the mayor, or passed over his veto. The charter of the city provides, that, "all legis- "lative power of the city is vested in the council "* * * and shall be exercised by ordinance; other "acts of the council may be by order upon motion" [*Sec.* 12, *Art. III, City Charter, Stats. Cal.* 1889, *p.* 456]; and by *Section* 15 of the same instrument, the enacting clause of all ordinances is required to be substantially as follows: "The mayor and council of the "city of Los Angeles do ordain."

None of the orders complained of has the form of an ordinance or purports to be an ordinance. The mode of exercising the legislative power of the city being prescribed, that mode is restrictive—no other mode could be followed—and no authority of the state exists for the performance by mere order, as described in the bill, of acts having the effect of laws; and, therefore, such orders cannot be regarded as laws of the state within the meaning of the constitutional prohibition against the passage of laws impairing the obligation of contracts.

"Acts of legislation by a municipal corporation "which are to have continuing force and effect, must "be embodied in ordinances, while mere ministerial 'acts may be in the form of resolutions. * * * "But where the charter requires an act to be done by "ordinance, or where such requirement is implied, as

"it is here, by necessary implication, a resolution is "not sufficient, but an ordinance is necessary." (Citing cases.)

Chicago, etc., R. Co. v. Chicago, 51 *N. E.* 596.

In the case of *Hamilton Gas Light Co. v. Hamilton,* 146 *U. S.* 458, it was held that acts of a municipality (even though expressed in the form of an ordinance), not passed under supposed legislative authority, were not laws of the state within the impairment clause.

"A municipal ordinance not passed under supposed "legislative authority cannot be regarded as the law "of the state within the meaning of the constitutional "prohibition against state laws impairing the obliga- "tion of contracts."

Nor are all ordinances, even though passed under authority of the state, laws within the meaning of this clause of the constitution. As was pointed out by Judge Taft in *Iron Muntain R. Co. v City of Memphis,* 96 *Fed.* 113.

"If such ordinance is *administrative,* rather than leg- "islative, then it is not within the constitutional inhi- "bition, even though it impairs the obligation of con- "tracts."

Not only does the bill fail to show any *law* impairing a contract, but it shows that no legal contract subject to impairment existed. The appellant claims to have become the owner of a franchise by virtue of certain sale proceedings under a statute which provides that the franchise shall be granted to the highest bidder at the sale or, in the event of his default, to the next highest bidder, and at the same time the bill affirmatively and expressly shows, as pointed out in the

opinion of the court below, that appellant was neither the highest bidder nor the next highest bidder. Later in this brief we shall more fully set forth this and other particulars in which the sale proceedings are shown on the face of the bill to have been entirely ineffectual for the purpose of vesting such franchise in the appellant.

It is of course obvious that if the bill shows that no contract (subject to impairment) existed, it can present no question under the impairment clause of the constitution. It is not sufficient to give this court jurisdiction, that the bill alleges that contract rights have been impaired.

" * * * the bare averment of a Federal question " is not in all cases sufficient. It must not be wholly " without foundation. There must be at least color of " ground for such averment, otherwise a Federal ques- " tion might be set up in almost any case, and the juris- " diction of this court invoked simply for the purpose " of delay. Thus in *Millingar v. Hartupee*, 6 *Wall.* 258, " it was held that to bring a case within that provision " of the Judiciary Act, which declares that the final " judgment of a state court may be re-examined, where " is drawn in question the validity of an authority ex- " ercised under the United States, there must be some- " thing more than a bare assertion of the exercise of " such authority. In delivering the opinion of the " court the Chief Justice observed: 'The authority in- " 'tended by the act is one having a real existence, de- " 'rived from competent governmental power. * * * " 'In respect to the question we are now considering, " 'authority' stands upon the same footing with 'treaty' " 'or 'statute.' If a right were claimed under a treaty " 'or statute, and on looking into the record, it should " 'appear that no such treaty or statute existed, or was " 'in force, it would hardly be insisted that this court " 'could review the decision of a state court, that the " 'right claimed did not exist.' This language was " used in connection with the first clause of section

" 709 of the Revised Statutes, 'where is drawn in ques-
" 'tion the validity of a treaty or statute of, or an au-
" 'thority exercised under, the United States, and the
" 'decision is against their validity,' but it is equally
" applicable to the next clause, which covers the case
" under consideration, "where is drawn in question the
" validity of a statute of, or an authority exercised
" 'under, any state, on the ground of their being re-
" 'pugnant to the constitution, treaties, or laws of the
" 'United States, and the decision is in favor of their
" 'validity.'

" Applying the principle of this decision to the pres-
" ent case, we think that before we can be asked to de-
" termine whether a statute has impaired the obligation
" of a contract, it should appear that there was a legal
" contract subject to impairment, and some ground to
" believe that it has been impaired; and that to con-
" stitute a violation of the provision against depriving
" any person of his property without due process of
" law, it should appear that such person has a property
" in the particular thing of which he is alleged to have
" been deprived."

New Orleans v. N. O. Water Works Co., 142 *U. S.* 79, 87.

It is true that this court has held that "all that is
" necessary to establish the jurisdiction of the court is
" to show that the complainant had or claimed in good
" faith to have a contract with the city which the latter
" had attempted to impair," and that "whether the state
" had or had not impaired the obligation of this con-
" tract was not a question which could properly be
" passed upon, on a motion to dismiss, so long as the
" complainant claimed in its bill that it had that effect,
" and such claim was apparently made in good faith
" and was not a frivolous one."

City R. Co. v. Citizens Street R. Co. 166 *U. S.* 557, 564;

Illinois C. R. Co. v. Adams, 180 *U. S.* 28, 36.

Yet, this does not mean that a mere general unsupported allegation that the suit is one arising under the constitution of the United States, or that a claim of a contract right ill pleaded or destitute of merit, is sufficient to confer jurisdiction. The jurisdictional allegations must be specific. As was said by Chief Justice Waite, writing the opinion in the case of *Gold Washing and W. Co. v. Keyes*, 96 *U. S.* 199, 201: "It is "well settled that in the courts of the United States "the special facts necessary for jurisdiction must, in "some form, appear in the record. * * * Be- "fore, therefore, a circuit court can be required to re- "tain a cause under their jurisdiction, it must, in some "form, appear upon the record, by a statement of facts, "'in legal and logical form,' such as is required in good "pleading [1 *Chit., Pl.* 213], that the suit is one which "'really and substantially involves a dispute or contro- "'versy' as to a right which depends upon the construc- "tion or effect of the constitution, or some law or 'treaty of the United States."

Speaking of its appellate jurisdiction, this court said in the case of *City of Lampasas v. Bell*, 180 *U. S.* 276, 282:

"This court has only jurisdiction by appeal or writ "of error directly from the circuit court in certain "cases, one of which is when the constitution or law "of a 'state is claimed to be in contravention of the "constitution of the United States.' *Sec.* 5 *of the Judi- "ciary Act of* 1891, 26 *Stat. at L.* 828, *Chap.* 517. But "the claim must be real and substantial. A mere claim "in words is not enough. We said by the Chief Justice "in *Western U. Teleg. Co. v. Ann Arbor R. Co.*, 178 "*U. S.* 239, 44 *L. Ed.* 1052, 20 *Sup. Ct. Rep.* 867; "'When a suit does not really and substantially involve "'a dispute or controversy as to the effect or construc- "'tion of the constitution or laws of the United States, "'upon the determination of which the result depends,

" 'it is not a suit arising under the constitution or laws.
" 'And it must appear on the record, by a statement in
" 'legal and logical form, such as is required in good
" 'pleading, that the suit is one which does really and
" 'substantially involve a dispute or controversy as to a
" 'right which depends on the construction of the con-
" 'stitution or some law of treaty of the United States,
" 'before jurisdiction can be maintained on this
" 'ground.'" (Citing cases.)

The question of the existence of a contract, and the question of its impairment in cases where the decision of the state court is to be reviewed are generally necessarily so closely connected that this court will not undertake to separate them, and in cases brought from a state court, where the impairment of a contract is charged, the existence or non-existence of the contract is, for jurisdictional purposes, treated as a Federal question. [*Yazoo and M. V R. Co. v. Adams,* 180 *U. S.* 1, 15.]

In such cases, the court has deemed itself bound, in determining the existence of a Federal question, to give to the contract alleged to have been impaired, the broadest construction claimed for it. [*Illinois Central R. R. Co. v. City of Chicago,* 176 *U. S.* 646, 656].

The case at bar can be distinguished from one brought to this court on writ of error from a state court where the judgment of that court, by its necessary operation, gives effect to some provision of a state law which is claimed to impair a contract set out and relied upon; in such a case the rule is that this court will take jurisdiction to review the judgment of the state court, and to determine without

reference to the state court's decision whether the contract exists as claimed.

Mobile and Ohio R. Co. v. Tennessee, 153 U. S. 486, 492;

McCullough v. Commonwealth of Virginia, 172 U. S. 102.

In such a case, as was said in *Columbia W. Power Co. v. Columbia Electric Street R. L. & P. Co., 172 U. S. 475, 488,* "It is the duty of this court to deter- "mine for itself the proper construction of the con- "tract upon which the plaintiff relies." The unsuccessful party having made the claim in the state court that his contract has been impaired and the state court having decided that there has been no impairment, the controversy as to the effect or construction of the Constitution or laws of the United States has arisen and it becomes necessary that this court, upon a writ of error to review the decision of the state court, should consider the question whether there was a contract at all as well as the question whether the contract has been impaired, for, as was said in the case last cited: "The question in either case is "whether the contract has been impaired, and that "question may be answered either by holding that "there is no contract at all, or * * * * that "the subsequent legislation did not impair it. These "are rather differences in the form of expression than "in the character of the question involved."

But in cases originally brought in a Federal court, as the Honorable Chief Justice has said, "it is neces- "sary to the exercise of original jurisdiction by the "circuit court that the cause of action should depend

"upon the construction and application of the Consti-
" tution, and it is readily seen that cases in that pre-
" dicament must be rare. Ordinarily, the question of
" the repugnancy of a state statute to the impairment
"clause of the Constitution is to be passed upon by the
" state court in the first instance, the presumption being
"in all cases that they will do what the Constitution and
" laws of the United States require [*Chicago & A. R.*
" *Co. v. Wiggins Ferry Co.*, 108 *U. S.* 18], and if there
" be ground for complaint of their decision, the remedy
" is by writ of error. * * * "

City of New Orleans v. Benjamin, 153 *U. S.* 411, 424.

The case just cited was one originally brought in the circuit court, which came to this court on a certificate from the circuit court of appeals, propounding, among other questions, that of jurisdiction, and the court said:

"But assuming that such repugnacy might be so set
" up as to form an independent ground of jurisdiction
" in the circuit court, it becomes necessary, in order to
" dispose of the inquiry whether such a dispute or con-
" troversy was really involved here, to refer to certain
" legislation of the state of Louisiana."

The court proceeded to examine the state statutes set forth in the bill, and the allegations of the complaint with respect thereto, and decided that "the decision of "the questions involved did not depend on the Federal "Constitution," and the court adverted to the distinction between a case originally brought in a Federal court and one brought to this court upon a writ of error to a state Supreme Court in these words:

" We are not dealing with a writ of error to review
" the final judgment of the highest court of a state in
" a suit wherein the validity of the statute of the state
" was drawn in question on the ground of repugnancy

" to the Constitution of the United States and the de-
" cision was in favor of its validity, but with the orig-
" inal jurisdiction of the circuit court, sought to be
" sustained on the ground that the cause of action
" arose under and was dependent upon the Constitu-
" tion.

"We are of opinion that the case made upon bill and
" answer did not really and substantially involve a dis-
" pute or controversy as to the effect or construction of
" the Constitution, upon the determination of which the
" result of the suit depended."

The circuit court cannot take jurisdiction of a controversy between citizens of the same state unless the complainant sets up in his bill, in *logical and legal manner*, rights arising under the Constitution and laws of the United States, and the inquiry to be made by the court in such a case is whether upon the allegations of the bill a Federal question is disclosed. In the case of *Vicksburg Waterworks Co. v. Vicksburg*, 185 *U. S.* 65, the bill showed that the city had been authorized by statute to make a contract for the erection and operation of waterworks; that such a contract had been made; and that subsequently, but before the term of that contract had expired, a statute was enacted authorizing the city to build its own waterworks, and pursuant thereto, the city called an election for the purpose of authorizing the issue of bonds for the construction of a system of waterworks, and by resolution of its board of aldermen disavowed any further liability under its contract with the water company. The case came to this court from the circuit court, and the question presented was whether the bill disclosed a Federal question so as to give the circuit court jurisdiction. This question the court said must be answered by an

inspection of the bill, and it appearing therefrom that an attempt had been made by subsequent legislation to deprive the complainant of its rights under an existing contract, the case presented was one within the jurisdiction of the circuit court, "*unless the city can "point to some inherent want of legal validity in the "contract.*" The objections to the validity of the contract urged in the brief of the city are stated in the opinion to be those which had been considered by the court in other cases and held to be untenable, and it was decided accordingly that the circuit court had jurisdiction.

The plain inference to be drawn from this decision is that if the city could have pointed out some inherent want of legal validity in the contract as set up in the bill, the cause would have been dismissed for want of jurisdiction. Applying the principle of this decision to the present case, we contend that if it can be pointed out that under the facts alleged in the bill no franchise was ever vested in appellant, no Federal question can be presented by an averment that appellant's rights under the franchise claimed, have been impaired and so far as any question under the impairment clause of the Constitution is concerned the bill would be dismissed for want of jurisdiction.

The appellant does not in the bill specifically claim that it has a contract with the city which the latter has attempted to impair. The bill merely sets out in detail the proceedings for the sale of a franchise. There was, as the circuit judge pointed out from an examination of the bill, an "inherent want

" of legal validity" in the proceedings, and consequently the bill shows that no contract ever arose. Under the circumstances we submit that there can be no opportunity to invoke the rule that a claim by the complainant in good faith of the existence of a contract will support the jurisdiction of this court under the impairment clause of the constitution. It cannot, we think, ever be said that in a case *orginally brought in a Federal court* a pleader will be deemed to claim in good faith to have a contract which his own pleading affirmatively shows does not exist. In such cases the rule is that the existence of the contract or the claim of its existence must be made to appear by a statement "in " legal and logical form such is required in good plead- " ing."

Gold Washing & W. Co. v. Keyes, 96 *U. S.* 199-201;

Western Union Tel. Co. v. Ann Arbor R. Co., 178 *U. S.* 239;

City of Lampasas v. Bell, 180 *U. S.* 276, 282.

II.

The bill does not state a case within the Fourteenth Amendment to the Constitution of the United States.

The appellant contends that under the provisions of the Act of 1901 it became the owner of the franchise by virtue of the proceedings of the city council described in the bill, concluding with the order of February 11, purporting to strike off, sell and grant the fran-

chise to the appellant, and that these appellees by their unlawful acts are about to deprive appellant of its rights under this franchise without due process of law. On the other hand, the appellees contend that said proceedings were fatally defective, and did not have the effect of vesting title to the franchise in the appellant. These conflicting contentions present the pivotal question of the case, viz: Is the appellant the owner of the franchise involved in this controversy? It is manifest that this question is one, the determination of which depends entirely upon the effect or construction of the laws of California relating to the grant of franchises.

McCain v. City of Des Moines, 174 *U. S.* 168, was a suit in equity by Walter McCain and others against the City of Des Moines and its officials to enjoin them from exercising any jurisdiction for the purpose of taxation over certain territory, known as Greenwood Park, included in recently extended limits of the city. The complainants alleged that the state statute under which the limits of the city were extended was void because in violation of the constitution of Iowa and that to subject the lands of complainants to the threatened taxes and assessments by the city would be to take their property under a void law and contrary to the Fourteenth Amendment to the constitution of the United States. The circuit court sustained a demurrer to the bill on the ground of want of jurisdiction and certified the question of jurisdiction to the Supreme Court for decision. This court affirmed the decree, and in the course of its decision said:

"It is, therefore, quite plain that the complainants "base their case upon the allegation that their prop- "erty is about to be taken from them by the city au- "thorities without due process of law, and in violation "of the Constitution of the United States, because the "act of 1890 violates the constitution of Iowa. That "is a question of law, depending for its solution "upon the law of Iowa, and as to what that law is, "the Federal courts are bound in such a case as this "by the decision of the state tribunal. There is no "construction of the Federal Constitution involved in "that inquiry, nor any question as to its effect upon "the complainants' rights in this suit. The question "whether their property is taken without due process "of law must be decided with sole reference to the "law of Iowa. How can it be said upon such facts "that any question arises under the Constitution or "laws of the United States? The claim of the com- "plainants will not be defeated by one construction of "that clause in the Constitution or sanctioned by the "other. [*Starin v. New York, 115 U. S. 248, "(29:388).*] There is no dispute about construction "in any way whatever; the only question is as to the "validity of the city organization, which, as stated, "is a matter of state law."

In *Manhattan Railway Company v. City of New York*, 18 *Fed. Rep.* 195, the complainants moved for a preliminary injunction to restrain the collection of taxes assessed by the commissioners of taxes and assessments in the City of New York on property owned or leased by the railway company, it being claimed that the state, by the laws under which the assessing officers acted, unlawfully discriminated between the complainants and individuals.

The court said:

"The averments of the bill are intended to make a "case arising under the fourteenth amendment to the "constitution, and if any Federal question is presented

"it arises under that amendment. * * * If the "complainants are entitled to any relief against the "proceedings of the defendants, it is not through any "right which springs from the fourteenth amendment, "but their right is founded on the laws of the state. "The questions which the controversy raises are only "such as are to be solved upon the statutory law of "New York. The suit, therefore, is not one arising "under the constitution or laws of the United States, "and as no diversity of citizenship exists between the "parties, this court cannot decide it. A case does not "arise under the constitution or laws of the United "States unless it cannot be decided without deciding "a Federal question. [*Hartell v. Tilghman*, 99 *U. S.* "547]; or, in other words, unless a Federal law is a "necessary ingredient in the case. [*Osborne v. Bank "of U. S.*, 9 *Wheat.* 738.]"

So, in the case under consideration, the claim asserted by appellant that, without due process of law, it is being deprived of its property, is not founded upon the theory that the laws of California do not afford ample means for testing the legality of the acts complained of, but is based upon the claim that appellant has a vested property right under the laws of the state of which the appellees threaten to deprive it in defiance of those laws.

If, then, it be assumed, as asserted by the appellant, that the acts of the appellees complained of are not sanctioned by the laws of the state, it remains to be considered whether those acts can be imputed to the state so as to make a case within the inhibitions of the Fourteenth Amendment.

In the case of *Manhattan Railway Company v. the City of New York, supra*, the question was whether the state had made or was enforcing by its laws a sys-

tem of taxation which abridged the privileges or immunities of the complainants, or denied to them the equal protection of the law. The court held that there was no discrimination in the laws of the state and, in reference to the acts of the tax officials, that:

"If the authorities of the city of New York are endeavoring to enforce the collection of taxes against the complainants which have not been assessed in conformity with the statutes of the state, if the taxing authorities, under color of law, are proceeding illegally, their action cannot be imputed to the state, and the constitutional provision need not be invoked and does not operate; and the complainants can obtain ample redress under the laws of the state."

In *Virginia v. Rives,* 100 *U. S.* 313, it was alleged that the officer of the state to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, *disregarded the statutes of the state* by selecting white persons only and refusing to select any persons of the colored race, solely because of their color. Upon this point the Supreme Court, after observing that the laws of Virginia made no discrimination against the colored race because of their color in the selection of juries, said:

"But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the state law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the state,' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong."

Mr. Justice Field, in a separate opinion, in the case of *Virginia v. Rives, supra,* in which Mr. Justice Clifford concurred, used this language:

"That section," (referring to section one of the Fourteenth Amendment) "is directed against the state. " Its language is that, '*no state* shall make or enforce " 'any law which shall abridge the privileges or immu- " 'nities of citizens of the United States; nor shall *any* " '*state* deprive any person of life, liberty or property " 'without due process of law, nor deny to any person " 'within its jurisdiction the equal protection of the " 'laws.' As the state, in the administration of its gov- " ernment, acts through its executive, legislative, and " judicial departments, the inhibition applies to them. " But the executive and judicial departments only con- " strue and enforce the laws of the state; the inhibition, " therefore, is in effect against passing and enforcing " any laws which are designed to accomplish the ends " forbidden. If an executive or judicial officer exer- " cises power with which he is not invested by law, and " does unauthorized acts, the state is not responsible " for them. The action of the judicial officer in such " a case, where the rights of a citizen under the laws " of the United States are disregarded, may be re- " viewed and corrected, or reversed by this court; it " cannot be imputed to the state, so as to make it evi- " dence that she in her sovereign or legislative ca- " pacity denies the rights invaded, or refuses to allow " their enforcement. It is merely the ordinary case of " an erroneous ruling of an inferior tribunal. Nor " can the unauthorized action of an executive officer, " impinging upon the rights of the citizen be taken as " evidence of her intention or policy so as to charge " upon her a denial of such rights."

In the *Civil Rights Case,* 109 *U. S.* 3, the Supreme Court, having under consideration the first section of the Fourteenth Amendment, said:

"It is state action of a particular character that is " prohibited. Individual invasion of individual rights " is not the subject matter of the amendment."

And, also, that:

" * * * civil rights, such as are guaranteed by " the constitution against state aggression, cannot be " impaired by the wrongful acts of individuals, unsup- " ported by state authority in the shape of laws, cus- " toms, or judicial or executive proceedings. The " wrongful act of an individual, unsupported by any " such authority, is simply a private wrong, or a crime " of that individual; an invasion of the rights of the " injured party, it is true, whether they affect his per- " son, his property, or his reputation; but if not sanc- " tioned in some way by the state, or not done under " state authority, his rights remain in full force, and " may presumably be vindicated by resort to the laws " of the state for redress. An individual cannot de- " prive a man of his right to vote, to hold property, " to buy and sell, to sue in the courts, or to be a wit- " ness or a juror; he may, by force or fraud, interfere " with the enjoyment of the right in a particular case; " he may commit an assault against the person, or com- " mit murder, or use ruffian violence at the polls, or " slander the good name of a fellow citizen; but, un- " less protected in these wrongful acts by some shield " of state law or state authority, he cannot destroy or " injure the right: he will only render himself amen- " able to satisfaction or punishment; and amenable " therefor to the laws of the state where the wrongful " acts are committed. Hence, in all those cases where " the constitution seeks to protect the rights of the citi- " zen against discriminative and unjust laws of the " state by prohibiting such laws, it is not individual of- " fenses, but abrogation and denial of rights, which it " denounces, and for which it clothes the congress with " power to provide a remedy. This abrogation and de- " nial of rights, for which the states alone were or " could be responsible, was the great seminal and fun- " damental wrong which was intended to be remedied. " And the remedy to be provided must necessarily be " predicated upon that wrong. It must assume that in " the cases provided for, the evil or wrong actually ' committed rests upon some state law or state author- " ity for its excuse and perpetration."

Kiernan v. Multnomah, 95 *Fed. Rep.* 849, was a suit by a resident and citizen of the state of Oregon against the sheriff of Multnomah county to restrain the collection of certain taxes for which the sheriff had a warrant, and under which he threatened to sell complainant's property for unpaid assessments. The complainant claimed by his bill that the tax and proceedings were not authorized by the law of the state—that the law was being misinterpreted and being misapplied by the sheriff, and that to sell in the manner threatened would be to take complainant's property without due process of law. The court said:

"The fourteenth amendment has reference exclu-
" sively to state action and not to any action by indi-
" viduals. It is a prohibition upon the state to 'make
" 'or enforce any law which will abridge the privileges
" 'or immunities of citizens of the United States,' or
" 'deprive any person of life, liberty, or property,
" 'without due process of law.' "

The court also held that:

"The questions sought to be presented in this case
" relate to the interpretation to be given a law of the
" state * * * under such cases when there is not
" the requisite diverse citizenship, or amount in contro-
" versy to give the court jurisdiction the remedy for
" the injuries complained of is in the state court. The
" bill of complaint is dismissed."

It appearing, therefore, that the question whether the acts of these appellees, done or threatened, are unlawful, in that they deprive the appellant of property without due process of law, involves only the construction of the statutes of the state, and does not require a consideration of the effect or construction of the Federal Constitution or laws, the bill does not present a case within the protection of the Fourteenth Amendment.

THE APPELLANT DID NOT ACQUIRE THE FRANCHISE IT CLAIMS, NOR HAS IT ANY VALID CONTRACT WITH THE CITY IN RELATION THERETO, FOR THE REASON THAT THE PROCEEDINGS FOR THE SALE OF THE FRANCHISE WERE FATALLY DEFECTIVE AND INCOMPLETE.

I.

The notice of sale did not conform to the requirements of the Act of 1901 in the kind of franchise offered for sale.

According to the allegations of the bill, the application of the appellant was made "under and in pursuance of the provisions of the said act" of 1901 [Tr. p. 5, fol. 8], and asked for "an electric street railway franchise to be constructed and operated upon certain public streets" of the city of Los Angeles [Tr. p. 5, fol. 9], but the notice of sale described a franchise for a railway along streets in Los Angeles to carry passengers and freight. It stated "that the street railroad "constructed and operated under said franchise shall "be used only for the transportation of passengers and "United States mail, and for the transportation, sub-"ject to the conditions and restrictions hereinafter "mentioned, of baggage and such packages and com-"modities as can be conveniently handled and carried "in enclosed cars of the character hereinafter de-"scribed." [Tr. p. 7, fol. 12.] "The conditions and restrictions" referred to are: "That no cars shall be "used on said road, or on any part thereof, for the "carriage of baggage, packages, or commodities, ex-"cept enclosed cars of neat and attractive design and

"construction, and not exceeding in length or width "the cars used for carrying passengers only.

"And provided, further, that no such cars used for "the carriage of baggage, packages or commodities "shall ever be run or operated over any part of said "route hereinbefore described which runs along any "part of Broadway, Main or Spring Streets in said "city." [Tr. p. 9, fol. 14.]

There is an essential difference between the kind of franchise thus described and the kind of franchise authorized by the Act of 1901 and applied for.

The meaning of the term "street railway" is well established in the law of this country, and we beg to call attention to certain authorities upon this subject, including a decision by the Supreme Court of California:

"The difference between street railroads and rail-"roads for general traffic is well understood. The "difference consists in their use, and not in their mo-"tive power."

Williams v. City Electric Street Ry. Co., 41 *Fed. Rep.*, 556.

"A railroad is for the use of the traveling public, in "the transportation of all passengers, baggage and "other freight; a street railway is dedicated to the "more limited use of the local public for the more "transient transportation of passengers only, and "within the limits of the city."

Louisville and P. R. Co. v. Louisville City R. Co., 2 *Duvall* (*Ky.*) 178.

An electric railway in streets intended to be used for the carriage and transportation of passengers, merchandise, baggage, mail, and express matter is not a

"street railway" as generally understood, but is a commercial railway.

Chicago and N. W. Ry. Co. v. Milwaukee, etc., 37 *L. R. A.*, 857.

"The term 'street railroad' applies only to such "roads the rails of which are to be laid to conform to "the grade and surface of the street * * *, "which runs at a moderate rate of speed compared "with commercial railroads, which carries no freight, "but only passengers. * * * "

Bloxham v. Consumers' Electric Light Co., 36 *Fla.*, 539; 51 *Am. State Rep.*, 44.

The constitution of the state of California provides for a state board of railroad commissioners and gives such board the power, and makes it its duty, "to es- "tablish rates of charges for the transportation of "passengers and freight by railroad and other trans- "portation companies."

Art. 12, Sec. 22, Constitution of California, 1879.

In the case of *Railroad Commissioners v. Market Street Ry. Co.*, 132 *Cal.*, 677, the board of railroad commissioners sought a writ of mandate to compel the defendant corporation, a company operating a street railroad in the city of San Francisco, to produce, and permit plaintiffs to examine, its books, records and papers, and the question arose: "Do the words of the "constitution, 'railroad and other transportation com- "'panies' include a street railway company in a mu- "nicipality engaged in the business of carrying passen- "gers on a street railroad?"

The Supreme Court of the state, in the course of its opinion, says:

"The constitution in no place mentions street-rail-
" road corporations, although there were many such
" corporations in existence at the time it was framed.
" The Civil Code of the state, at the time, in title III
" [Secs. 454-491], contained many provisions in re-
" gard to 'railroad corporations,' and in title IV [Secs.
" 497-511], treated of and provided for 'street-railroad
" 'corporations.' Those sections of the code so treat-
" ing railroad corporations and street-railroad corpora-
" tions under separate and distinct titles had long been
" a part of the law of the state. Therefore, we must
" presume that (constitutional) convention—in which
" there were many lawyers of ability—knew that the
" two classes of corporations had long been known by
" the legal profession, and treated by the people,
" through their legislatures, as separate and distinct—
" the one being engaged in the commercial business of
" carrying freight and passengers over the quasi-pub-
" lic ways from one part of the state to another, the
" other in carrying passengers only in the larger mu-
" nicipalities of the state, the one obtaining its fran-
" chise from the state, the other from the municipal au-
" thorities of the town or city in which it was carrying
" on its business."

The Act of 1901 contains no provision for the grant of a franchise to construct and operate a commercial railway running between points within the limits of a city. It expressly includes "street railroads," and excludes "steam railroads" from its operation, and, according to the authorities submitted by us a "street railroad" is dedicated to the use of the public for the carriage of passengers only, while the term "steam railroad" applies to all roads used in the transportation of passengers, baggage and other freight, without regard to the motive power.

Under these circumstances the notice of sale was irregular and unauthorized, and invalidated the sale made thereunder.

The object of the notice of sale is to secure the attendance of purchasers and thus obtain a fair price for the franchise as the result of competition. To attain this object, it is important and necessary that the notice should be free from mistakes or irregularities which are calculated to deter or mislead bidders, or to depreciate the value of the franchise, or to prevent it from bringing a fair price, for, as stated in the note of Mr. Freeman to *Hoffman v. Anthony*, 6 *R. I.* 282; 75 *Am. Dec.* 701, "such mistakes or omissions will be fatal to " the validity of the notice, and also to that of the sale " made pursuant thereto."

In a case of a sale of land under a power contained in a mortgage, where the tract advertised was stated to contain four acres more than the tract embraced in the mortgage, it was held:

"If, therefore, the power of sale conferred by the " mortgage is not strictly and fairly pursued; if the " execution of the power is tainted with fraud; or if " any mistake is made in conducting the sale adapted " to mislead those who might desire to purchase, so " that the sale, if at auction, occurs under circum- " stances calculated to depreciate the value of the prop- " erty to be sold, or prevent it from bringing a fair " auction price, the sale will be held invalid."

Fenner v. Tucker, 6 *R. I.* 551.

In a case where an act of mortgage describes the land as containing 640 acres, it was held that the mortgagee will not be allowed to proceed to sell the property under an order of seizure and advertisement

describing the land as containing 640 superficial arpents, the court saying:

"Such proceedings are entirely inadmissible, and "lead to inextricable difficulties. Not only the interest "of the parties, but that of the public who are invited "to become purchasers, requires that they should not "be countenanced."

Wright v. Russel, La. An. Vol. 5, *p.* 126.

In a case where the advertisement of sale of mortgaged premises under a power, stated that the premises were to be sold for defaults of three mortgages, where there were only two, the third being on other land, it was held that:

"Such a false allegation tended to deceive the public "as to the extent of the incumbrances, and to deter "purchasers from bidding."

Burnett v. Dennister, 5 *Johns.* 35.

The value of a street railway franchise, pure and simple, is susceptible of determination, at least approximately, but if it be coupled with a privilege which is illegal and which may or may not affect the validity of the franchise, according as the courts may subsequently decide, bidders would either be deterred from bidding at all or would refuse to offer for the franchise what it should bring if properly advertised for sale. This point is well illustrated in the case of *Fenner v. Tucker, supra.* If the quantity of land to be sold had been correctly advertised, but the deed had included four acres more than the tract embraced in the mortgage, the mistake, we presume, would not have affected the purchaser's title to the mortgaged premises.

So, in a proceeding under the Act of 1901, if the

notice of sale should describe a franchise for a street railroad, but the grant should include rights and privileges which might only be enjoyed under a franchise for a steam or commercial railroad, the grant would, no doubt, be good for the purpose of conveying a franchise for a street railroad to carry passengers only, although void in respect to the rights and privileges pertaining to a steam railroad. The trouble in the case of *Fenner v. Tucker supra,* as in the case at bar, was that the irregularity was contained in the notice of sale, which was jurisdictional, and was such as would probably discourage bidding and depreciate the price by begetting uncertainty in the minds of the bidders whether a grant based on the notice would convey title to the property.

Hence, we contend that the inclusion in the notice of sale of a more extensive privilege than the council could grant, was "fatal to the validity of the notice and also to that of the sale made pursuant thereto."

II.

Two Franchises were included in the sale proceedings at one time.

Referring to the bill, the court will find that the description in the notice of sale of the route of the contemplated street railway carried it to the intersection of Mateo and Palmetto streets; "thence northerly "over private right of way, to the intersection of "Fourth street and Santa Fe avenue, etc." [Tr. p. 6, fols. 10-11.]

We contend that this private right of way constituted an absolute break in the route of the proposed *street railroad,* separating it into two independent parts, and rendering necessary two distinct franchises, which, under the Act of 1901, could only be sold singly. The jurisdiction of the municipal authorities in granting a street railway franchise under that Act must, in the very nature of things, be restricted to streets and highways. The franchise gives the right to the grantee to enter upon and dig up the streets named in the franchise, lay down ties and rails and operate cars over the same, but when he comes to private property, even though included in the description of the route, he must stop, because the franchise does not give him the right of way over the private property.

In support of our contention upon this branch of the case, we beg to cite *Beekman v. Third Avenue R. Co.,* 153 *N. Y.* 144; 47 *N. E.* 277, which construes a statute of the state of New York providing for the sale and grant by the local authorities of franchises for the construction or extension of street surface railroads, and in which the facts are strikingly similar to those in this controversy. One of the questions decided by the court was:

"Whether the common council of the city of New "York can, under the provisions of section 93 of the "railroad law, make a valid sale of more than one "extension of an existing railroad at the same sale, "to be struck off upon one bid, when the said exten- "sions are separated from each other in such a way "that they can only be operated together over the lines "of the said existing railroad."

The defendant company, which was the owner of the existing railroad, applied for the franchise for these extensions and the same was sold and granted to it. In its application it consented that in case any other corporation became the purchaser of the right to construct and operate a railroad upon the proposed branches or extensions, it should have the right, in perpetuity, to use the tracks of the intervening road in order to construct a continuous line of railroad and unite the two branches thus separated into one; and the grant of this right by the defendant was one of the conditions upon which the consent of the local authorities was given, and a part of the thing sold.

The action was brought by property owners against the defendant to perpetually restrain the construction of the proposed branches or extensions.

Upon the question above set forth, it was contended by counsel for the defendant "that there was in fact " but one branch or extension of the defendant's road " contemplated, and but one franchise sold."

The court said:

"This proposition is deduced from the fact that " what are here referred to as two branches or exten- " sions were to be connected by a section of the main " line of the defendant's railroad, about half a mile in " length. * * * With respect to this connecting " link, neither the state nor the city had any franchise " to sell. What the latter advertised and sold was not " the thing which the statute authorized it to adver- " tise and sell, but a part of the defendant's property. " It is quite true that it did all this with the defend- " ant's authority and consent, but the statute con- " ferred no power upon it to act as the defendant's " agent in commingling together public and private

"rights. * * * A purchaser at the sale, other "than the defendant, might succeed in constructing "and operating a continuous line of railroad, but it "could not acquire and would not own a continuous "franchise. The physical structure might be united "and operated by the acquisition of private property, "but the franchises would still remain, as they were "before, separated by the intervening paramount right "which was vested in the defendant."

The court, therefore, decided:

"We think that the consent for the construction of "two branches or extensions of the defendant's rail-"road as one act, conditioned upon a sale at auction of "both under one bid, was not a compliance with the "letter or the spirit of the statute, and was not, there-"fore, a valid exercise of the power conferred upon "the city authorities by the statute."

And as it was held in the Beekman case, that the franchises for the two proposed branch roads were distinct, because the branches were separated by a section of an existing road over which the city authorities, acting under the state law, had and could have no jurisdiction, so it should be held here that the franchises for the two sections of the proposed street railway, on either side of the private right of way, remain distinct because these two sections are separated by the intervening private right of way, over which the city council had no jurisdiction or power to grant a franchise. Furthermore, it should be held in this case, just as was held in the Beekman case, that, although a purchaser at the sale might succeed in constructing and operating a continuous line of railroad, he could not acquire and would not own a continuous street railroad franchise. The physical structure might be

united and operated by the acquisition of the private right of way, but the franchises would still remain, as they were before, separated by an intervening paramount right, with respect to which neither the state nor the city had any street railway franchise to sell.

We contend further that the Act of 1901 contemplates the sale of franchises singly. The object of the Act is, as stated in the brief of counsel for appellant [p. 37], "To dispose of these franchises in the best "manner and for the best prices. * * * To ex- "press it briefly, to sell for a price, and the best ob- "tainable, upon a fair sale, is written all through the "statute, and is unmistakable."

The Act refers uniformly in the singular number to the franchises to which it applies, in providing for the application and the advertisement of the notice of sale; in prescribing the contents of such notice and the manner of bidding and of conducting the sale; in requiring the payment by the grantee of a franchise of a percentage of the gross receipts arising from its use, operation and possession; in prescribing the method of estimating the gross receipts arising from the operation of an extension of an existing system of street railroads; and in requiring "the grantee of every fran- "chise or privilege granted under this Act" to file a bond inuring to the municipality, conditioned for the performance of the terms and conditions of the franchise.

The scheme of the Act of 1901 is very similar to that of the statute construed in the case of *Beekman v. Third Avenue Railway, supra.* Neither law expressly provides that franchises shall be sold singly, but the

language of each, by unmistakable implication, requires this to be done.

"The language of the statute seems to contemplate "the sale of a franchise for a single branch extension, "and not several branches or extensions grouped to- "gether. The provisions for a single fare, for the di- "vision of the gross receipts from joint business, and "the manner of calculating the percentage to be paid "to the city, all point in the same direction."

Beekman v. Third Avenue Railway, supra.

At each of two places, other than the private right of way hereinabove considered, the description in the notice of sale prescribes alternative routes, one over certain designated streets, and the other "over private "right of way" [Tr. p. 7, fol. 11], and counsel for the appellant, in anticipation of an adverse argument on behalf of the appellees, attempt in their brief [pp. 138-9] to justify this alternative arrangement, but they do not defend, nor even refer to, the private right of way above mentioned, which constituted the only route for the construction of the road between the intersection of Mateo and Palmetto streets and the intersection of Fourth street and Santa Fe avenue.

Counsel for appellants contend that the inclusion of private property in the route of the proposed street railway would not divide the franchise into two parts, nor invalidate it, for the reason, as they suggest, that the grantee thereof might acquire the right of way over such private property by proceedings under the power of eminent domain. [Brief, p. 140.]

Counsel seem to take it for granted that the owner of a street railway franchise may condemn a right of

way over any private property traversed by the route of the proposed road, where it leaves the streets. But we submit that the power of eminent domain cannot be exercised for the purpose of acquiring a right of way on which to build street railway tracks. A *street railway* built upon a private right of way would be a curious anomoly. The statute law of California upon the subject of eminent domain is contained in *Title 7, Sections 1237-1263 of the Code of Civil Procedure*, of that state, and Sec. 1238 thereof specifies the public purposes in behalf of which the right of eminent domain may be exercised. The only provisions of that section under which counsel could possibly claim that private property might be condemned for the purpose of constructing and operating street railroads are contained in Subdivision 4, which reads as follows:

"Wharves, docks, piers, chutes, booms, ferries, "bridges, toll-roads, by-roads, plank and turn-pike "roads; paths and roads either on the surface, ele- "vated or depressed, for the use of bicycles, tricycles, "motor-cycles, and other horseless vehicles, steam, "electric and horse railroads, canals, ditches, dams, "pondings, flumes, aqueducts and pipes, for irriga- "tions, public transportation, supplying mines and "farming neighborhoods with water, and draining "and reclaiming lands, and for floating logs and lum- "ber on streams, not navigable."

The term "street railroads" is not found in this provision, and, in view of the well recognized and thoroughly established distinction in the laws of California between commercial railroads, whatever may be the motive power, and "street railroads" [*Railroad Commissioners v. Market Street Ry. Co., supra*], the court

will readily perceive that it was not the purpose of the legislature to include street railroads within the provisions of Sec. 1238 of the Code of Civil Procedure.

In the case of *Thomas & Houston Electric Company v. Simon*, 20 *Oregon* 60, the Supreme Court of the state of Oregon had under consideration the question whether a street railway company could exercise the power of eminent domain under the Oregon statute, which provides that a corporation organized for the construction of "any railway" may appropriate land for right of way, and after pointing out the distinction between a traffic railroad used for the purpose of transporting passengers, baggage and freight, and a street railway, the court said:

"It is not enough that a railway is for a public use " to authorize the taking of private property, but the " taking must be for a public use within the scope of " its undertaking, and the object which it is to sub- " serve. To authorize railroads operated for such pur- " poses to take the private property of the citizen and " appropriate to its use without his consent, the statu- " tory authority for it must be plainly given; other- " wise, the right does not exist. In view of these con- " siderations, we do not think that the provisions of the " statute for the condemnation of a right of way apply " to the plaintiff, so as to authorize it to take private " property without the consent of the owner for its " own use as a right of way."

In *South Beach Ry. Co. v. Byrnes*, 23 *N. E. Rep.* 486, the court said:

"* * * the chief element of a street railway, as " authorized by the Act of 1884, is that it is built upon " and passes along streets and avenues for the con- " venience of those living or moving thereon. Its " fundamental purpose is to accommodate the street " travel, and its motive power is dictated and regulated

" to that end; and while, consistently with its general " object, it may need for switches or storage or stables " or stations the land of private owners, yet that ne- " cessity is only incidental to the main purpose of a " line along the streets accommodating the street " travel. Here, the land of Mrs. Byrnes is needed to " build the main and principal part of the line, only " that it may avoid the streets altogether. The Act of " 1884 stamps an indelible mark upon the corporations " which it organizes. The consent of the local authori- " ties is to be obtained, and that of a certain portion " of the abutting owners; or, in default of the last, the " certificate of chosen commissioners. Every step of " the way, through all the conditions of the act, it " plainly contemplates a railway along the streets and " avenues of a village or city. * * * If we upheld " this contention it might be possible to build a street " railway for a city along a hundred feet of a street " and then condemn the land in the center of the " blocks all the way to its terminus."

In the case of *Dewey v. Chicago & M. Electric Ry. Co.*, 56 *N. E. Rep.* 804 it was said:

"A street railroad is built to accommodate street " travel, and it has no use for private property, except " so far as it may need the same for a side-track, turn- " out or a station, or as an incident to its main line. " The necessity for its condemnation of property must " be a necessity, which is incidental to the main pur- " pose of the line along the street, accommodating " street travel. Street railways are railways on or " upon the streets of a city or town. They have no " right to diverge from the street and condemn pri- " vate property, unless some obstruction or conforma- " tion of the surface of the ground makes such di- " vergence necessary, in order to avoid discomfort or " danger to the travelling public. A street railway " may not, like a steam railway, locate its route, in " order to reduce time and distance for passengers " traveling from town to town across the country. " Such location of its route is not for the accommoda-

"tion of local travel on the highways or streets, and "therefore involves a perversion of the character and "object of street railways. * * * "

Dewey v. Chicago & M. Electric Ry. Co., 56 *N. E. Rep.* 804.

The following paragraph from the decision in the case last cited, is peculiarly pertinent to the point under consideration:

"The corporate authorities of the village of Glencoe "had no authority to authorize a condemnation of "private property. The authority to condemn comes "from the state, and must be derived from the statutes "of the state. The village authorities may refuse to "consent to the use of their streets and alleys by a "street railway corporation, but their consent or re- "fusal to the use of their streets is the extent of their "power. They control the streets, alleys and public "grounds of the village, but they do not control pri- "vate property. Any attempt of the village authori- "ties, by consenting to a particular location of a street "railroad across private property, to cause the street "railroad to diverge from the streets, alleys, and pub- "lic grounds under their control, is void, and confers "no right and creates no necessity."

Counsel profess to be unable to see any difference between an act of Congress or of a state legislature incorporating a railway company and authorizing it to construct its line across the country or state, and a sale and grant by local authorities of a right of way in specified public streets for the purposes of constructing and operating a street railway under a law authorizing such sale and grant.

A company like the appellant, for instance, organized under the general incorporation laws of the state of California, for the purpose of constructing and op-

erating street railways, has the right under its charter to engage in that business in the city of Los Angeles, but until it gets a franchise from the authorities of the city, under another and different law of the state, to-wit., the Act of 1901, it has no right to construct and operate a street railway in the streets of that city. That is, there is a difference between the act of incorporation giving a company existence and clothing it with the right of carrying on a certain kind of business, and an act of the local authorities giving that company the right to transact that business in such locality.

We submit, therefore, that, under any view of the case, there is a break in the continuity of the franchise, making two separate roads and rendering necessary two distinct franchises, which could only be offered for sale and sold singly.

III.

The sale proceedings were void on the ground of unlawful discrimination.

It is submitted that the sale proceedings discriminated in favor of the "person, firm or corporation" owning the private property, or having a right of way across the same, as against any other person, in bidding for the purchase of the franchise, and were, therefore, void, because obnoxious to Section 9 of the Act of 1901, which provides:

"Sec. 9. No clause or condition of any kind shall "be inserted in any franchise or grant offered or sold "under the terms of this act, which shall directly or

"indirectly restrict free and open competition in bid-
"ding therefor, and no clause or provision shall be in-
"serted in any franchise offered for sale which shall
"in anywise favor one person, firm, or corporation, as
"against another, in bidding for the purchase thereof."

If, as the bill indicates to be the case, the right of way had been already acquired for street railway purposes, then certainly the owner of the right of way was the only person who could purchase the franchise and use it as one franchise, because, if the property had already been dedicated to the purpose of constructing a street railway, it was not subject to condemnation for a like purpose by any other person, even if the right of eminent domain is available for the purpose of condemning a way for the construction of a street railway, which we deny.

"Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;
2. That the taking is necessary to such use;
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

Sec. 1241, Code of Civil Procedure of California.

If, however, the private right of way did not exist, then the owner of the private property would be the only person who could purchase the franchise and use it as one franchise, because, as we have shown, his property could not be taken from him by condemnation, and without his consent the road could not be built; or, if the right of eminent domain does exist in such a case, the owner of the property would still enjoy an advantage not possessed by any other person in

his ability to comply with the requirements of the Act of 1901 that the grantee of a franchise should commence work within four months and complete the road within three years from the granting of the franchise, under penalty of forfeiture of the franchise, and loss of the amount of the bond given to secure the performance of the terms and conditions of the franchise.

The fact that appellant's application included the private right of way in the route for which it sought a franchise, shows that appellant was the owner of such right of way for street railway purposes and, therefore, the council by including the same in the route of the proposed road practically selected the appellant as the purchaser of the franchise.

In the Beekman case, the court in support of its construction that the New York statute required franchises be sold singly, in order to avoid discrimination, said:

"But perhaps the weightiest reason for this view is "to be found in the fact that a sale of the franchise "for several branches or extensions of an existing "railroad at one time and under one bid would de- "feat the general purpose of the statute, and enable "the Common Council in most cases practically to se- "lect the purchaser of the right."

IV.

The bid of the appellant under which it claims to have acquired the franchise was illegal and void, and the Council had no power to accept the same nor to sell or grant the franchise thereunder.

This point is exhaustively treated and thoroughly established in the opinion of the Honorable Judge of the Circuit Court [*Tr. p.* 44, *fols. 72 et seq.;* 118 *Fed. Rep.* 746.], and we deem it unnecessary in presenting this point to do more than to state, in outline, the reasoning and conclusions of the opinion, and to reply to some of the matters contained in the brief of counsel for the appellants upon this branch of the case.

The court below prefaced its discussion of the question, whether or not the council complied with the Act of 1901, by adverting to the familiar rule of statutory construction that "mode is the measure of power." [*Fort Scott v. Eads Brokerage Co.*, 117 *Fed. Rep.* 51; *Board v. Templeton*, 51 *Ind.* 266; *Woodruff v. Berry*, 40 *Ark.* 253; *Saddler v. Eureka*, 15 *Nev.* 39; *State v. Cornell*, 52 *Neb.* 25, 71 *N. W. Rep.* 961; *Webster v. French*, 12 *Ill.* 302; *Zottman v. San Francisco*, 20 *Cal.* 97; *McCracken v. San Francisco*, 16 *Cal.* 620; *Heidelburg v. St. Francois County*, 100 *Mo.* 69, 12 *S. W. Rep.* 914.]

The court also called attention to the fact that the provision in section one of the act that franchises "shall be granted upon conditions in this act provided, " and not otherwise," showed an intent to make its provisions imperative [23 *Amer. & Eng. Ency. of*

Law, 1st Ed. 455; *Koch v. Bridges,* 45 *Miss.* 247; *Hurford v. City of Omaha,* 4 *Neb.* 336; *Cooley's Constitutional Limitations, 6th Ed.* 89], and that additional energy was imparted to the mandates of the act by section ten, making penal any violation of the act.

After making a critical examination of the language of section 5, which prescribes the mode of procedure to be followed by the council in granting a franchise under the act, the court said:

"The various steps, for which the section provides, " consecutively arranged, are these: First, opening of " the sealed bids; second, opportunity for further com- " petition, in the manner and upon the terms prescribed " in the section; third, striking off of the franchise to " the highest bidder; fourth, allowance of twenty-four " hours to the successful bidder to deposit the amount " of his bid; and, fifth, in case said bidder fails to make " the deposit, grant of the franchise to the next highest " bidder therefor. I do not mean, that each step after " the first must follow immediately, in point of time, its " nearest antecedent, but, that nothing affecting the " result of the competition can intervene between any " two of said steps. Exigencies may arise, at any " stage of the proceedings, to justify a postponement " or adjournment of the whole matter, but whenever " its consideration is resumed, the order of progression " I have indicated must be adhered to." [Tr. p. 46, fol. 76.]

The court, therefore, held that when the time allowed by law to Murray, the highest bidder, to deposit the amount of his bid had expired, namely, at 3:15 p. m. of Feb. 11th, 1902, and he had failed to make the required deposit, "the action that should have " been next taken is prescribed in the last clause of said " section, already partially considered, which provides, " that, if the successful bidder fails to make the de-

"posit required of him, 'the franchise shall be granted "to the next highest bidder therefor.' When, speaking "concretely, the contingency referred to in said clause, "namely, Murray's failure to deposit the amount of "his bid, occurred, in the afternoon of February the "11th, 1902, it was then the duty of the council to "grant the franchise to the next highest bidder, unless "there was some sufficient reason for a refusal. This "qualification of the council's duty I make because "of the charge in the bill, that the next highest bid "was fraudulent. Assuming the truth of this charge, "which must be done on demurrer, the council ought "not to have granted the franchise to said bidder. "When it refused to do so, however, its power in the "premises was exhausted, because said act of 1901 "makes no provision for any subsequent proceeding, "and the alleged grant of the franchise thereafter to "complainant was without authority and void." [Tr. p. 47, fols. 76-77.]

Counsel for appellant contend that the last clause of section 5, providing that if the highest bidder fails to deposit the amount of his bid within the time prescribed, "the franchise shall be granted to the next "highest bidder therefor," means that upon the default of the highest bidder there should be another competition, and that the franchise should be struck off to him who next bids the highest therefor, and if he also defaults, further competition shall be had, and so on, until the highest bidder at one of these successive competitions actually pays the amount of his bid, and thus becomes, as counsel contend [brief p. 55] the "successful bidder," to whom the act requires that the franchise "shall finally be struck off, sold and granted." In response to a similar argument in the court below, the Honorable Circuit Judge said:

"Complainant's construction of said clause, namely: " 'The meaning fairly is nothing more nor less than " 'this—that it should be struck off to him who next " 'bids the highest therefor,' is, to my mind, wholly " inadmissible and must be rejected. It is inconsistent, " as I have just shown, with the peculiar phraseology " of the clause, and as appears below, does violence to " the general plan of the section. If the legislature had " intended that there should be further competition af- " ter default of the successful bidder, it would have " chosen apt words to express the intention, rather " than language which implies the contrary, and, be- " sides, would have prescribed fully the nature and " duration of the subsequent competition, that is, " whether it was to be by sealed or open bids, and when " it was to close." [Tr. p. 46, fols. 75-76.]

The meaning of the words "next highest bidder" appears to us to be too plain to admit reasonably of more than one interpretation. The word *next,* it seems, is an irregular superlative of near, and may, therefore, be treated as synonymous with nearest, and, in the position it occupies in the phrase, "the next highest bidder," it cannot, we submit, be regarded grammatically as anything but an adverb modifying the adjective highest, so that the evident meaning of the expression is *the nearest highest bidder,* that is, the bidder whose bid is nearest to the highest.

In *Murdock's Case, 2 Bland's Ch. (Md.),* 461; 20 *Am. Dec.* 381 this identical phrase was used with reference to a sale made by a trustee in a foreclosure suit. The trustee sold a parcel of the mortgaged premises to the highest bidder, Elizabeth Murdock, on condition that if she did not pay the amount of her bid on the day the sale was confirmed, the sale would be made

to "the next highest bidder," William Brewer. In approving the action of the trustee, the chancellor said: "* * * where there is a just reason to believe that "some one or more persons intend to outbid all others, "with a design to embarrass the court * * * the "court may order or allow the trustee to report two or "more persons as the highest bidders, upon the ex- "press condition that if he who is reported as the high- "est bidder does not comply with the terms of sale, "the next highest bidder may be received and consid- "ered as the purchaser." And Elizabeth Murdock having failed to pay the purchase money, the chancellor ordered that Brewer, the "next highest bidder," be admitted as the purchaser.

It is, of course, true that the object of the Act. of 1901 is that the best obtainable price may be secured for the privilege which the municipality may have proposed to grant. But this does not mean that the municipality is, therefore, free to depart from the mode of obtaining that price which is prescribed by the statute. It might happen that a better bargain could be made for the performance of a piece of municipal work than is offered by the lowest bidder under a statute requiring all work to be let to such bidder. Yet, this fact, although it might justify the rejection of all bids, would not authorize the letting of the contract to any but the lowest bidder, ascertained in the manner prescribed by the statute. The mode prescribed for the exercise of a power conferred upon a municipality is restrictive and affords the measure of that power. And this is emphatically true, when the statute itself says, as in this case, that the power shall be exercised "upon the conditions in this act provided, and not oth-

"erwise." Whether the method prescribed by the statute is really the best that might have been devised, or is even efficient for the purpose aimed at, is immaterial. As was said by the Circuit Judge in this case, "the rule "is well settled that the language of a statute, when "plain and unequivocal, determines its meaning re- "gardless of consequences." [Citing authorities.]

V.

An ordinance (or resolution adopted and approved in the same manner as an ordinance) was essential to the granting of the franchise.

We submit that under the statutes of the State of California and the charter of the City of Los Angeles, an ordinance adopted by the legislative or governing body of the city, and approved by the mayor, or passed over his veto (or a resolution adopted and approved, or passed, in the same manner) was necessary to the grant of such a franchise as is claimed by appellant.

1. The statutes of California require the grant of a street railway franchise to be made by ordinance or resolution, adopted by the legislative body of the municipality, and approved by the mayor, or passed over his veto.

In 1897 the legislature of the State of California passed an act entitled:

"An Act to require ordinances and resolutions "passed by the city council, or other legislative body, "of any municipality to be presented to the mayor,

" or other chief executive officer, of such municipality " for his approval."

Statutes of Cal. 1897, *p.* 190,

This act became a law by the approval of the governor on March 27th, 1897, and provides as follows:

"Every ordinance and every resolution of the city " council of a municipality providing for * * * " the granting of any franchise, or other privilege " * * * which shall have passed the city council, " shall, before it takes effect, be presented to the " Mayor for his approval. The Mayor shall return " such ordinance or resolution to the City Council "within ten days after receiving it. If he approve it "he shall sign it and it shall then take effect. If he "disapprove it he shall specify his objections thereto in "writing. If he do not return it with such disap- "proval within the time above specified, it shall take "effect as if he had approved it. The objections of "the Mayor shall be entered at large on the journal of "the City Council and the City Council shall cause the "same to be immediately published. The City Council "shall, after five and within thirty days after such "ordinance or resolution shall have been returned with "the Mayor's disapproval, reconsider and vote upon "the same; and if the same shall, upon reconsideration "be again passed by the affirmative vote of not less "than three fourths of all the members, the presiding "officer shall certify that fact on the ordinance or reso- "lution, and when so certified, it shall take effect as if "it had received the approval of the Mayor; but if the "ordinance or resolution shall fail to receive, upon the "first vote thereon after its return with the Mayor's "disapproval, the affirmative votes of three-fourths of "all the members, it shall be deemed finally lost."

In view of the fact that the act of 1901 does not prescribe the mode in which the action of the legislative or governing body of a municipality proposing to grant a franchise thereunder shall be performed and

does not contain anything inconsistent with the act of March 27th, 1897, it must be presumed that the legislature intended that the two acts should be construed together for the regulation of the sale and grant of franchises and privileges by the governing bodies of municipalities. This contention gains strength from the history of the legislation of this State in respect to the sale of street railway franchises. The first act on this subject was approved March 23rd, 1893. [Stats. Cal. 1893, p. 288.] This act was succeeded and supplanted by an act on the same subject approved March 13th, 1897, [Stats. Cal. 1897, p. 135]. Subsequent to the approval of the latter act, and at the same session of the legislature, the act of March 27th, 1897, above referred to, was passed and approved. There can be no doubt that the act of March 27th, 1897, applied to the sale and grant of franchises under the act of March 13th, 1897, because there is no inconsistency between the two statutes. The latter statute simply prescribes the manner in which the act of granting a franchise under the earlier statute shall be performed—a subject upon which the earlier statute was silent. The statute of 1901 in turn supplanted the statute of March 13th, 1897, and like its predecessor, this statute was silent as to the mode in which a grant of a franchise should be made.

As the acts of March 13th, 1897 and March 27th, 1897, were not inconsistent, but supplemented one another on the subject of the granting of franchises and privileges in municipalities, so the act of 1901, being silent like its predecessor upon the subject of the

mode in which such grants shall be expressed, must be construed with the act of March 27th, 1897, as part of one scheme relating to the sale and grant of franchises requiring that grants proposed to be made under the act of 1901 shall be made in the form and mode prescribed by the act of March 27th, 1897, to-wit, by an ordinance or a resolution of the City Council, presented to the mayor and approved by him, or, upon reconsideration, passed over his veto.

2. The charter of the city of Los Angeles requires that the grant of a franchise shall be made by ordinance, adopted by the city council and presented to and approved by the mayor, or passed over his veto.

The necessity for an ordinance adopted by the city council and approved by the mayor, or passed over his veto, is to be found not only in the act of March 27th, 1897, but also in the city charter of the city of Los Angeles.

The charter of the city of Los Angeles provides that "All legislative power of the city is vested in the "council, subject to the power of veto and approval by "the mayor as hereinafter given, and shall be exer-"cised by ordinance; other action of the council may "be by order upon motion."

City Charter, Sec. 12, *Statutes of Cal.* 1889, *p.* 456.

"The enacting clause of all ordinances shall be sub-"stantially as follows: The mayor and council of the "city of Los Angeles do ordain as follows:"

City Charter, Sec. 15, *Statutes of Cal.* 1889.

Sec. 16. "Six members of the council shall con-"stitute a quorum for the transaction of business, but

" no ordinance shall be passed or other act done grant-
" ing a franchise, making any contract, auditing any
" bill, ordering any work to be done, or supplies to be
" furnished, disposing of or leasing the city property,
" ordering any assessment for street improvement, or
" building sewers, or any other act to be done involv-
" ing the paying of money, or the incurring of debt by
" the city, unless two-thirds of the members of the
" whole council vote in favor thereof. All other ordi-
" nances may be passed by a vote of a majority of the
" whole council."

Sec. 37. "Every ordinance which shall have been
" passed by the council shall, before it becomes effect-
" ive, be signed by the city clerk or other person au-
" thorized by the council to sign the same on its be-
" half, and be presented to the mayor for his ap-
" proval and signature, if he approves it; if not, he
" shall indorse thereon the date of the presentation to
" him and shall return it to the city clerk with his ob-
" jections in writing. The city clerk shall indorse
" thereon the date of its return to him, and shall at
" the first meeting of the council thereafter present the
" same with the objections of the mayor, to that body.
" Thereupon the council shall proceed to reconsider
" the passage of the ordinance. Upon such reconsider-
" ation, in all cases where the votes of two-thirds of the
" whole council are required to pass the ordinance in
" the first instance, it shall require the votes of three-
" quarters of the whole council to pass the ordinance
" over the mayor's veto. The vote, in all cases of re-
" consideration, shall be by ayes and noes, and the
" names of the members voting for or against shall be
"entered upon the journal."

Sec. 40. "The council shall also have full power to
" pass ordinances upon any other subject of municipal
" control or to carry into effect any other powers of
" the municipality."

These provisions leave no room for doubt that the grant of the right or privilege to construct and operate a street railway in the city of Los Angeles must be

made by an ordinance adopted by the city council and approved by the mayor, or passed over his veto, because, in the first place, such right or privilege is a franchise within the meaning of Sec. 16 of the city charter, and, in the second place, such grant is a legislative act.

Prior to the enactment of the Franchise Act of 1893 [*Stats.* 1893, *p.* 288], heretofore referred to, no definite scheme for the sale of franchises to the highest bidder had been provided by the legislature, but Section 497, in the title "Street Railroad Corporations," of the Civil Code of California, as amended in 1876 and 1891, provides that "authority to lay" (street) "railroad tracks through the streets * * of any "incorporated city * * may be obtained from the "trustees, council or other *body to whom is intrusted "the government of the city* * * upon such "terms * * as the city or town authority may "provide * * "

This section of the Code, providing that authority to lay railroad tracks may be obtained from "the body "to whom is entrusted the government of the city," subjects the granting of such authority to municipal control, and the acts of 1893, March 13th, 1897, and 1901, prescribe the conditions under which franchise "hereafter proposed to be granted by boards of super-"visors * * or other governing or legislative "bodies * * shall be granted."

Nothing is expressly said in Section 497 of the Civil Code, or in any of the three acts referred to about the manner in which franchises shall be granted; but

speaking of Section 497, Civil Code, the Supreme Court of this state, in the case of *Eisenhuth v. Ackerson*, 105 *Cal.* 87, said:

"There was no necessity for providing the mode or "manner of the grant, so long as the legislature was "content with the modes already provided by the "charters of the different cities and towns in the "state, although the governing bodies of such cities "and towns were differently constituted and governed "by charters prescribing different modes of municipal "legislation."

And the court held that there was nothing in the provisions of Section 497 of the Civil Code inconsistent with that section of the Consolidation Act of San Francisco (its legislative charter), which provided that every ordinance or resolution of the board of supervisors granting any privilege, "after the same "has passed the board, shall, before it takes effect, be "presented to the president of the board" (the mayor) "for his approval," and that, if he returns it without such approval, it may be passed by a two-thirds vote over his objections. And, it appearing that the mayor's veto of the ordinance granting to the plaintiff a franchise to construct a street railroad had been sustained by the board of supervisors, the court held that the defendant street superintendent should not be enjoined from preventing the construction of said railroad.

To this judicial construction of the language used in Section 497 of the Civil Code, which, as has been shown, is paraphrased by the language of the Act of 1901, may be added what may be considered a legislative construction thereof, to be found in Section 502

of the Civil Code, which was amended in 1895, subsequent to the decision of the case of Eisenhuth v. Ackerson, *supra,* and at a time when the franchise act of 1893 was in force.

That section provides that:

"Work to construct the railroad must be commenced in good faith within not more than one year "from the date of the taking effect of the *ordinance* "granting the right of way, and said work must be "completed * * " etc.

Civil Code, Sec. 502.

In the case of *Thompson v. Supervisors of Alameda County,* 111 *Cal.* 553, the court had under consideration the Franchise Act of 1893: *"An act providing "for the sale of railroad and other franchises in mu- "nicipalities, and relative to granting franchises,"* and also the County Government Act of 1893. The Franchise Act of 1893 was the first of the three statutory schemes that have been enacted in this state for the sale of franchises to the highest bidder. It went into effect on March 23d, 1893, and the County Government Act of that year went into effect upon the following day. Section 25 of that act declared what were the general permanent powers of boards of supervisors, and a subdivision thereof gave to such boards power "to grant franchises * * * upon such "terms and conditions and restrictions as, in their "judgment, may be necessary and proper. * * * "

It was urged by the defendants in that case that the Franchise Act of 1893 was unconstitutional because it attempted to deal with franchises issued by counties at the hands of their respective boards of supervisors,

while the title of the act was not broad enough to include counties. And that, if this were not true, the act was repealed by the County Government Act which took effect subsequently and gave power to boards of supervisors to grant franchises upon such terms as they judged necessary and proper. But the court held that the title of the Franchise Act was broad enough to cover all the legislation found in it, and that it was therefore applicable to counties, and that there was no such inconsistency between the Franchise Act and the County Government Act as to call for the determination by the court that the former was repealed by the latter. "Full force and effect may be given to "both," the court said, "the franchise may be sold to "the highest bidder and still the terms, conditions and "restrictions upon which the franchise will be granted "may be fixed by the board of supervisors under its "general permanent powers."

Section 16 of the charter provides that "no ordi- "nance shall be passed * * * granting a fran- "chise * * * unless two-thirds of the members "vote in favor thereof," and the charter nowhere provides that a grant of a franchise may be made otherwise than by ordinance. Since, then, the power to grant franchises is conferred upon the city of Los Angeles by the legislature, and the grant of franchises is thereby made a "subject of municipal control" within the meaning of Section 40 of the charter, we submit that it is a necessary and unavoidable implication from the organic law of the city that such power and such control can be exercised by ordinance only.

The case of *Newman v. City of Emporia*, 4 *Pac.* 815, was a suit to restrain the collection of an assessment for street work. The plaintiff claimed that the proceedings authorizing the work to be done were informal—the irregularity being that "what should have "been done by ordinance, was done by resolution." And the court said:

"* * * we think the same ought to have been "done by ordinance. * * * It is true that the "statutes nowhere in express terms require that the "same must be done by ordinance; but we think they "require it by the strongest inference, and by neces- "sary and unavoidable implication. It is true that the "statutes in terms merely provide that cities of the "second class 'are authorized and empowered to en- "'act ordinances' to make such improvements [see "said Section 32], and not anywhere in terms pro- "vide that such improvements can be made only in "pursuance of an ordinance; and the language of said "Section 75 is also to some extent misleading, and "probably did mislead the city authorities of Emporia "into doing by resolution what they should have done "by ordinance. This section provides, among other "things, that when the city council has passed a reso- "lution declaring the improvement to be necessary and "given proper notice thereof in the official newspaper "of the city, then, 'if a majority of the resident own- "'ers of the property liable to taxation therefor shall "'not, within 20 days thereafter, file with the clerk "'of said city their protest against such improvement, "'then such council shall have the power to cause such "'improvement to be made and to contract therefor, "'and to levy taxes as herein provided.' The city au- "thorities probably supposed that after they had com- "plied with the provisions of said Section 75 that "'then such council,' without the mayor or any other "officer of the city, 'shall have power to cause such "'improvement to be made, and to contract therefor, "'and to levy taxes,' without observing any further "formalities."

But the court held that while said Section 75 of the organic act of the city of Emporia gave the authority to the council to make the improvements, without specifying in what manner that authority should be exercised, yet that Section 32 gave power to do such things by ordinance, and did not give authority to do them in any other manner, and that, therefore, an ordinance was necessary, and no ordinance having been passed, that the proceedings were void.

Similarly, in the present case, although the act of 1903 does not in express terms require the grant of a franchise to be made by ordinance, yet, by the city charter, all legislative power, and all municipal powers over subjects of municipal control must be exercised by ordinance.

That the grant of a franchise is a legislative act is supported by abundant authority.

"It is essential to the character of a franchise that " it should be a grant from sovereign authority, and " in this country no franchise can be held which is " not derived from a law of the state."

Bank of Augusta v. Earle, 13 *Peters* 519. *p.* 595.

"Franchises are rights and privileges acquired only " by special grant from the public through the legis- "lature."

St. Louis, etc., R. Co. v. Balsley, 18 *Ill. App.* 82.

" * * * * the state has no proprietary interest in " the streets of a city dedicated to public use * * * " When the state grants to a private corporation an " easement over the streets, not common to the public " at large, it acts in its sovereign capacity and grants " a franchise * * * "

San Francisco v. Spring Valley W. W., 48 *Cal.* 493.

"The authority of the city board of trustees" (to grant the right to construct, maintain, and operate a steam railroad in public streets of the city), "under the "statutes referred to, is legislative on its nature; it is "of a piece with the power to enact municipal police "and other ordinances—local laws [*McCracken v. "San Francisco*, 16 *Cal.* 620], and is not referable for "its support to the power of making contracts. (Cit- "ing cases) * * * The streets of the city are "not held as corporate or municipal property, subject "to the powers of contractual disposition. * * * "

South Pasadena v. Terminal Ry. Co., 109 *Cal.* 315.

" * * * the granting of a franchise" (for a street railway) "is not the same thing as a contract "and the exercise of such a power cannot be vindi- "cated or upheld as falling within the same rule as "the power to make contracts."

People's R. R. v. Memphis R. R., 10 *Wall.* 38.

"A franchise is a special right or privilege granted "by the people to an individual * * * The legis- "lative character of the grant is the same whether it "passes to the individual from the people, via the state "legislature, or by way of a municipal board of su- "pervisors having the authority vested in it by the "state legislature to enact the grant. When legislative "power is vested in a municipal board, acts done in "the exercise of that power are acts of legislation, and "should be recognized as such by the courts. It has "been decided by this court that the granting of a "franchise is a legislative act. This has been decided "in a long, unbroken line of cases, beginning with "*Chard v. Harrison*, 7 *Cal.* 113, and ending with "*Quinchard v. Board of Trustees*, 113 *Cal.* 664."

People v. Dean, 122 *Cal.* 421.

Since the charter prescribes the mode in which the legislative power of the city must be exercised, to-wit, by ordinance, that mode is restrictive and exclusive.

In the case of *McCracken v. San Francisco,* 16 *Cal.* 591, the Supreme Court of this state, referring to the section of the charter of San Francisco which provided that the council of that city "should have power " within the city to pass all proper and necessary laws " for the regulation, improvement, and sale of city " property," said:

"When that instrument" (the charter) granted a " power with a specific designation as to the mode in " which it should be used, the mode was restrictive— " no other mode could be followed."

And in its opinion the court quotes, with approval, the language of the Supreme Court of New York in the case of *The Farmers Loan & Trust Company v. Carroll,* 5 *Barb.* 649:

"When a corporation relies upon a grant of power " from the legislature to do an act, it is as much re- " stricted to the mode prescribed by the statute for its " exercise, as to the thing allowed to be done."

"The rule is general, and applies to the corporate " authority of all municipal bodies—when the *mode* " in which their power on any given subject can be ex- " ercised is prescribed by their charter, the mode must " be followed. The mode in such cases constitutes the " measure of the power."

Zottman v. San Francisco, 20 *Cal.* 102.

Counsel for appellant, on the other hand, contend that an ordinance is not essential to the grant of a franchise; that the only action on the part of the council contemplated by the act is a mere order or declaration that the franchise be "struck off, sold and granted " * * * to the highest bidder therefor"; and that insuperable difficulties would arise in the operation of

the scheme contained in the act for the sale of franchises, if grants must be made by ordinance.

They argue that if the purchaser paid his money within one day and filed his bond within five days after the passage of the ordinance by the council, and the mayor took ten days to consider the ordinance, it would be absurd to suppose that he could then veto it after the franchise was paid for and the required bond filed.

But we submit that this supposition is not any more absurd than the contention counsel themselves make, viz., that the franchise is actually and finally sold to the highest bidder at the time of the acceptance of his bid by the council, although he has not paid his money or filed his bond, and may never do so.

According to counsel, everything required by the law to be done by the council in order to vest title to the franchise in the highest bidder is done at the time of the acceptance of his bid, although he has not paid his money or filed his bond, and may never do so.

Counsel profess not to be able to believe that the bidder is required to deposit his money and file his bond while there is a contingency that the grant to him may not be consummated, but they see nothing unreasonable in making a complete grant of a franchise to one who has neither paid the purchase price nor given security for the performance of its conditions. Is the difficulty that the bidder might deposit his money and not get the franchise any more serious than the alternative difficulty that the franchise might be granted and no money or security be received by the city?

If the law contemplates, as counsel contend, that the highest bidder for a franchise has twenty-four hours *after the grant is made* in which to pay the purchase price, and five days *after the grant is made* in which to give his bond, and if we are correct in our contention that the grant may only be made by an ordinance approved by the executive, or passed over his veto, how is it possible for the difficulty suggested by counsel to arise, viz: that the bidder may pay his money and execute his bond, only to have the executive *thereafter* defeat the sale by vetoing the ordinance? At all events, if the bidder has twenty-four hours and five days, *after the grant is made,* in which to pay his money and file his bond, it is immaterial whether the grant has to be made by ordinance or by resolution.

Counsel for appellant have called attention, in their brief [pp. 93 *et seq.*], to the provisions of the constitution of California, subjecting to the control of the general laws of the state, all cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of the constitution, *except in municipal affairs,* and also to the fact that the charter of the city of Los Angeles was framed and adopted under the authority of that constitution, and is, therefore, not subject to, nor controlled by, general laws in municipal affairs.

Counsel contend that the granting of street railway franchises in the city of Los Angeles and the manner in which such grants are to be expressed, are both subject to the control of general laws, because, as counsel assert, neither the granting of such franchises, nor the manner of making such grants, is a "municipal affair"

within the meaning of the constitution. But, under the authorities just cited by us, it is immaterial whether the granting of a street railway franchise in the city of Los Angeles and the manner of expressing such grants are municipal affairs or not, for the reason that, whether the provisions of the charter or of the general laws control, in either case an ordinance or resolution of the city council providing for the grant of such franchises must, *before it takes effect*, be presented to the mayor and be approved by him, or passed over his veto.

If the manner in which the grant of a franchise is to be expressed is a municipal affair, the charter requirements that such an act must be performed by ordinance would be applicable, and, in the case of a conflict between the charter and the general law, would control. On the other hand, if the manner in which the grant of a franchise is to be expressed is not a municipal affair, then the provisions of the general law contained in the Act of March 27th, 1897, requiring an ordinance or resolution granting a franchise to be approved by the mayor or passed over his veto, are applicable.

In this connection, it may be noted that the Supreme Court of California, in the case of *Morton v. Broderick*, 118 Cal. 486, has held that the act of March 27, 1897, did not apply to San Francisco for the reason, as stated in the opinion of the court, "that it unquestionably deals with a municipal affair, "the mode and manner of the passage of ordinances "and resolutions provided for in the charter."

That case was an original proceeding in mandate to compel the auditor to enter taxes upon the assess-

ment roll in conformity with the rates fixed by the board of supervisors. Respondent contended that the levy was illegal because it lacked the signature of the mayor as required by the Act of March 27, 1897, which provided that all ordinances and resolutions passed by the city council, or other legislative body of the municipality, should be presented to the mayor for his approval. In passing upon this point, the court, after adverting to the fact that the mayor's signature is in terms required by the provisions of the Act of 1897, said:

> "* * * But before this act it had been believed by the legislature and by the people that "it would be wiser to relieve charters of cities "from the operation of general laws affecting "municipal affairs, lest otherwise there would be "danger of the charter provisions being entirely "'frittered away'. In accordance with this belief, an amendment to the Constitution was "adopted in 1895 [Stats. 1895, p. 450], providing that 'cities and towns heretofore or here-"'after organized, and all charters thereof framed "'or adopted by authority of this Constitution, "'*except in municipal affairs*, shall be subject "'to and controlled by general laws.' The "amendment is found in the italicized words. The "act of 1897 unquestionably deals with a municipal affair, the mode and manner of the passage of ordinances and resolutions provided for "in the charter. Under this constitutional "amendment, such acts now apply only to cities "and to their charters which have organized "under the general scheme embraced in the "municipal corporation act. [Stats. 1883, p. "93.] San Francisco is not one of such cities, "and the act of 1897 has, therefore, no application to it."

If, as counsel contend, the matter of granting a franchise for a street railway in the city of Los Angeles, is not a "municipal affair," for either of the reasons suggested by counsel, to wit, because it is not a proper subject for municipal control, or because it is not provided for in the charter, then the act of March 27th, 1897, applies. Hence we submit, that whether the act of March 27, 1897, requiring all ordinances or resolutions granting a franchise to be presented to and approved by the mayor, or passed over his veto, is applicable to the city of Los Angeles or not, there can be no escape from the proposition that an ordinance (or resolution adopted and approved in the same manner as an ordinance) was essential to the granting of a franchise to the appellant.

Counsel for appellant argue [brief, p. 119], that "When the charter of the city of Los Angeles said "that in order to grant a franchise an ordinance was "necessary to be approved by the mayor, the natural "construction of it would be that the granting of "franchises here mentioned and referred to was the "grant of such franchises as by the charter the city "was authorized to grant. * * * Now, under "the charter, the city has the power to grant many "different franchises." And counsel proceed to enumerate the kinds of franchises that the city, by express provision of its charter, has the power to grant—street railway franchises not being included in the number. And counsel, therefore, conclude that the manner prescribed by the charter for the execution of grants of franchises, to wit, by ordinances, has no application to street railway franchises. But this argument is effectually disposed of by the decision in the case of

Eisenhuth v. Ackerson, supra, in which the Supreme Court of California held that while the power of the municipality to grant street railway franchises was derived from a general law of the state, to-wit, Section 497 of the Civil Code, yet the provisions of the organic law of the city requiring the grants of all privileges to be made by ordinance, or resolution, approved by the mayor, or passed over his veto, were applicable to grants of street railway franchises. This case is specially significant on this point, in view of the fact that the charter of San Francisco, like our own, contained no express provisions relating to the grant of street railway franchises.

Counsel for appellant lay great stress upon the proposition that no ordinance can be necessary to the grant of a franchise because, as they contend, the language of the act of 1901 excludes the possibility of the construction that the mayor has anything to do with such a grant or that, between the time of advertising the sale and the time of a failure on the part of a successful bidder to file his bond, any discretion is left to the council. And in support of this proposition counsel point out [Brief, p. 76] that after the franchise is advertised for sale the act declares that it *shall* be struck off, sold and granted to the highest bidder. But we submit that this apparently mandatory language does not mean that, a franchise once having been offered for sale, the legislative body has no discretion but to grant it to the highest bidder, regardless of the amount of his bid or of the contingency that public interest may require a modification of the terms of the fran-

chise advertised,—or even an abandonment of the proposed sale and grant.

It is a common provision of the law relating to municipal contracts that, after advertisement inviting proposals, they *shall* be awarded to the lowest bidder. Yet, according to the authorities, this does not mean that the council has not discretion to refuse to award the contract to the lowest bidder and to reject all bids.

In the case of *Walsh v. Mayor etc., of New York*, 113 *N. Y.* 142, the Court of Appeals of New York was called upon to construe a statute relative to contracts by the mayor, aldermen and commonalty of the city of New York, and, speaking by Peckham, J., said:

"It is true that the language of that act is quite per-
" emptory, and provides that all contracts 'shall be
" 'awarded to the lowest bidder for the same, with
" 'adequate security, and every such contract shall be
" 'deemed confirmed in and to such lowest bidder at
" 'the time of the opening of the bids, estimates or pro-
" 'posals therefor, and such contract shall be forthwith
" 'duly executed * * * with such lowest bidder.'
" Under such law it is quite clear that no contract
" could be let to any person other than to the lowest
" bidder with adequate security. The obvious purpose
" was to secure to the city the advantages of having
" its work done by the lowest bidder therefor after
" proper advertisement. I do not think that it meant
" to compel the making of a contract even with such
" lowest bidder, if it were plain that the bids were all
" largely in excess of the real cost of the work. * * *
" The existence of such a power might frequently be
" necessary to protect the city against fraudulent com-
" binations, evidenced, perhaps, by informal bids for
" low prices, and if such power did not exist, ending in
" the award of a contract to the lowest bidder whose
" bid was formal, but at a price enormously in excess
" of the real cost of the work. It was never intended,
" as we think, to render it absolutely necessary in such

" a case that an award of the contract should be made " to such a bidder. It was meant that no contract " should be awarded to any but the lowest bidder, and " whether to him or not, would be a question for the " body awarding the contract, acting in good faith, " and for what they deemed the true interests of the " city.

" If otherwise, if there were but one bid, and that " vastly in advance of a fair price and decent profit, " nevertheless, the city would be bound to have such " a contract saddled upon it. It would require the " plainest commands from the legislature before we " should be able to bring ourselves to think for a mo- " ment that any such result was intended. We do not " think that the act cited contains such language, or " that it was ever intended to accomplish any such " end."

Applying this principle to the present case, we submit that the fact that the law requires that franchises shall be sold and granted to the highest bidder, does not militate against the position we have taken, since it is not at all inconsistent with this requirement that the governing body of a municipality at any stage of the proceedings for the sale of a franchise, before the grant is actually made by ordinance, should have the right to reject all bids for the franchise. The law prescribes the mode and conditions of granting franchises, but leaves the governing body to determine in the exercise of its legislative discretion whether or not the grant shall be made. This is particularly true of those provisions of the act of 1901 under which this case has arisen.

The plain purpose of the act is, not to compel the grant of a franchise, but to limit the power of the municipality in the making of such grants, so that if the

grant is made, a price—and that the best obtainable—should be secured therefor. There is no intention disclosed in the act to render it absolutely necessary to confer the privileges advertised for sale upon anyone, simply because his was the highest bid. It was meant that no franchise should be awarded to anyone but the highest bidder, and whether to him or not would be a question for the legislative body granting the franchise, acting in good faith, and for what they deemed the true interests of the city, to decide. And in the case of the city of Los Angeles, such body is, as we have shown, the mayor and city council.

In view of the fact that the city holds its streets in trust for the people, and in acting upon an application for a franchise therein, is presumed to be guided by considerations of the public interest and welfare, public policy requires that, in a controversy between the city and an individual as to the construction of a statute relating to the grant of such a franchise, all doubts should be resolved in favor of the city. It is a familiar rule of construction:

" * * that where a statute operates as a grant " of public property to an individual, or the relinquish- " ment of a public interest, and there is a doubt as to " the meaning of its terms, or as to its general purpose, " that construction should be adopted which will sup- " port the claim of the government rather than that of " the individual. Nothing can be inferred against the " state."

Slidell v. Grandjean, 111 *U. S.* 412.

"It is * * imperative upon the court to jealously "guard against every unauthorized diminution of the "rights of the public."

Citizens Coach Co. v. Camden Horse R. R. Co., 29 *N. J. Eq.* 299.

The legislature, in providing for the sale of franchises in the streets of municipalities, recognized that these privileges have become immensely valuable, particularly in the large cities, and the evident purpose of the law is to enable the city authorities to obtain for such franchises sums commensurate with their value. But this purpose can only be accomplished by construing the law so as to give the governing body of a municipality, where it is proposed to grant a franchise, the right to refuse all bids therefor, when, in its judgment, the highest offer is inadequate. Otherwise, such governing body would be a mere puppet, having no discretion or authority in conducting a sale except to grant the franchise to the highest bidder, without regard to the amount of the bid or the value of the franchise, or other considerations of public interest.

Counsel cite the case of Jacobs v. Board of Supervisors, 100 Cal. 121, in support of the proposition that the grant of the franchise claimed by the appellant did not require any action by the mayor to make it effectual, but an examination of that case will show that it is not an authority upon the question under consideration.

Section 1, of Art. XIV of the constitution of California, declares that the rates for the use of water supplied to any city and county shall be fixed annually "by the board of supervisors, * * * or

"other governing body of such city and county, by "ordinance or otherwise, in the manner that other "ordinances or legislative acts or resolutions are "passed by such body."

The question arose in the Jacobs case whether the mayor of San Francisco had the legal right to veto an ordinance of the board of supervisors fixing the water rates, and also whether a court could by mandamus compel the board of supervisors to refix water rates, unless they either yield to the views of the mayor, or are able to pass the ordinance over his veto, and the court decided in the negative upon both these points.

In the opinions in the case it is pointed out that, under the express provisions of the charter of San Francisco, the board of supervisors is the legislative body as to all subjects of legislation with a few special exceptions, and its acts do not *generally* require the approval of the mayor; that "the supervisors act "judicially when fixing the water rates and decide "upon the evidence presented, according to their hon- "est convictions and best judgment"; that to hold that the mayor has the legal right to veto a water rate ordinance would "involve a palpable absurdity, "or an attempt to accomplish an absolute impossibility " * * * and failure to consummate the "purpose of the constitutional provision under re- "view;" that "fixing water rates is an entirely different "thing from passing or refusing to pass a proposed "order or ordinance, which merely involves ordinary "considerations of public policy, and is not an abso- "lute necessity"; that the power to fix water rates

comes from the constitution and was "expressly "granted to the board of supervisors; and in the "grant no mention is made of the mayor."

The concurring opinions of four of the seven justices were based upon the fact that, under the provisions of the organic law of San Francisco, the approval of the mayor "is required to only certain "classes of ordinances", which are specifically enumerated, and "that an ordinance fixing water rates is not "included in either of these classes".

The foregoing extracts from the opinions in the Jacobs case are sufficient to show that it has no bearing upon the questions in this case. Here the action of the governing body was legislative in character, and did involve "considerations of public policy", and was not "an absolute necessity". In the Jacobs case, the power to be exercised was expressly granted to "the board of supervisors"; here it is expressly vested in the "legislative or governing body" of the municipality, which, under the charter, is the mayor and council, and which, under the charter and the statutes of the state, by express provision [act of March 27, 1897], and by necessary implication, [Eisenhuth v. Ackerson, *supra*] is required to act by ordinance, adopted by the council and approved by the mayor, or passed over his veto.

For the same reasons the case of Truman v. Board of Supervisors, 110 Cal., 128, cited by counsel, is also without applicability to the question under consideration. The board of supervisors of the city and county of San Francisco fixed the tax rate under the statutes of the state which expressly provided that

"the board of supervisors of each county must * * * * fix the rate of county taxes, etc.," [Political Code title 9, part 3] and the court held, in the Truman case, that a writ of mandate would not lie to compel the board to act a second time in fixing the rate of taxation, in subordination to the veto of the mayor, "because, under the present statutory law, the board of supervisors of the city and county of San Francisco have the power to fix the rate of taxation and the mayor has no veto of their action in the matter". The power to fix the tax rate is by the express language of the statute conferred upon the board of supervisors alone, while the power to grant franchises is expressly conferred upon the "legislative or governing body"—which, in the city of Los Angeles, includes the mayor as well as the council.

Counsel also contend [brief p. 135] that, even if a formal ordinance approved by the mayor was necessary to perfect the legal title of appellant to the franchise, the appellant has done all the statute required of it, and if anything was necessary to complete the legal title, still the equitable title was vested in the appellant, and could no more be divested or impaired than the complete legal title could be. This contention, however, ignores the fact that under the laws of California [Act of 1901; Act of March 27, 1897; and Section 497 of the Civil Code], the power to grant street railway franchises in the city of Los Angeles is vested in the "legislative body" of the city, to wit, the mayor and council, and, therefore, it was not competent for one branch of that body, namely the council, by any independent action, to grant any title

to the franchise, whether legal or equitable, or in any manner to bind the executive so as to deprive him of the power to exercise his discretionary veto. In other words, action by the mayor and council expressed in the form of an ordinance adopted by the council and approved by the mayor, or passed over his veto, must precede the grant of the franchise and there can be no such thing as an equitable right or inchoate title to a sovereign grant of a franchise.

Futhermore, the argument of counsel that when the highest bidder for a franchise has done all that the statute requires of him and nothing remains to be done except the making of the grant by the legislative body, the equitable title to the franchise is vested in him, fails to distinguish between the character of the act of making a legislative grant, and the character of the act of making a grant of property, although, as counsel themselves recognize, "a franchise is not the "property of the state in any proper sense of that "term, it is a sovereign power and prerogative" [brief p. 129]. The authorities do hold that a property right springs out of a grant of a franchise by the state, but none of them treat the act of making such a grant as anything but legislative or governmental in character.

The grant of a franchise—the act of granting it—is not a contract, and we think has never been held to be such. It is the relation between the grantee and the state, which results from the acceptance of the grant as the basis of action after it is made which is treated as a contract.

" * * * the granting of a franchise is not the "same thing as a contract, and the exercise of such

"a power cannot be upheld or vindicated as falling "within the same rule as the power to make con- "tracts."

Peoples' Railroad v. Memphis Railroad, 10 Wall. 38, 51.

There is, as was pointed out by Justice Brown in the case of *Walla Walla v. Walla Walla Water Co., 172 U. S. 1*, "a substantial distinction between the "acts of a municipality as the agent of the state * " * * and its acts as the agent of its citizens." Acting in the former capacity, it exercises powers which are public, governmental, or sovereign in character; in the latter capacity it exercises powers of a quasi-private, proprietary, or business nature. The contract making power of a municipal corporation necessarily extends only to those matters in which it has a proprietary or quasi-private interest where it acts for the private advantage of its inhabitants, or of itself as a legal personality. But "the streets of a "city are not held as corporate or municipal property "subject to the power of contractual disposition, like "the property of an individual."

South Pasadena v. Terminal Ry. Co., 109 Cal. 315, 322;

San Francisco v. Spring Valley Water Works, 48 Cal. 529;

In re Philadelphia, etc., Ry. Co., 6 Wheat. 44.

"It assists to an understanding of the extent of "legislative power over municipal corporations prop- "er (incorporated towns and cities) to observe that "these, as ordinarily constituted, possess a double

"character; the one governmental, legislative or "public; the other, in a sense, proprietary or private."

Dillon's "Municipal Corporations," 4th ed., sec. 66.

There cannot be any doubt in which of these two characters a municipal corporation acts when granting a franchise.

In conclusion, we submit for the reasons and upon the authorities above set forth,

That the Court has no jurisdiction of this cause, because no diversity of citizenship exists, and because the bill does not state a case within the protection of the impairment clause of the Constitution, or within the protection of the Fourteenth Amendment thereto.

That there is no equity in the bill, because the appellant did not acquire the franchise it claims, nor has it any valid contract with the city in relation thereto.

Respectfully submitted,

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